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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 780 and 781

WILLIAM J. DRURY,

Petitioner,

vs.

STEPHEN E. HURLEY, JOHN W. CLARK and ALBERT E. WILLIAMS, Civil Service Commissioners of the City of Chicago.

and

THOMAS E. CONNELLY,

Petitioner,

vs.

STEPHEN E. HURLEY, JOHN W. CLARK and ALBERT E. WILLIAMS, Civil Service Commissioners of the City of Chicago.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioners.

ODE L. RANKIN,
Of Counsel.

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Petition to review Records of Appellate Court of Illinois for the First District, Chicago Illinois (Nisi Prius Nos. 44764 and 44765).

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Judges of the Supreme Court of the United States:

Your petitioners William J. Drury and Thomas E. Connelly, each citizens of the United States of America, and of

the State of Illinois and residents of the City of Chicago, County of Cook and State of Illinois come now by their counsel, Luis Kutner and respectfully show unto the court as follows:

They seek here to have reviewed judgments entered against them by the Appellate Court of Illinois for the First District thereof, at Chicago, Illinois, upon appeal by respondents from the Superior Court of Cook County, Illinois, which judgments became final in said Appellate Court when the Supreme Court of Illinois the highest judicial tribunal of that State, denied their petitions for leave to appeal thereto from said Appellate Court.

Petitioners were Lieutenant and Captain of Police, respectively, of the City of Chicago and were ordered discharged by the Civil Service Commissioners of Chicago respondents for the sole reason that petitioners had refused to sign immunity waivers when brought before the grand jury of Cook County in a proceedings instituted by the State's Attorney of Cook County in which they were subjects of the inquiry upon a charge of which they were found by said Commission to be innocent, and when being prosecuted by a hostile State's Attorney seeking to destroy them professionally, and to have them discharged from their offices.

Procedural History.

These cases have a common origin in the Civil Service Commission of the City of Chicago, Illinois. They involve the same ultimate facts and present the same questions of law for decision. Separate complaints were filed before said Commission against petitioners charging each with conduct unbecoming a police officer. The charges being the same, petitioners were, by stipulation, tried together

and a common or single transcript of the proceedings was preserved by the Commission. Each officer was discharged upon the same ground, but by separate orders.

Each defendant filed his own petition for certiorari in the Superior Court of Cook County, a court of general jurisdiction, and separate records were returned to each writ, except this, that a common transcript of the proceedings at the trial was filed in the William J. Drury case and by order was allowed to stand as a return to the Thomas E. Connelly petition and the two cases were heard together, but separate judgments rendered. The original transcript of proceedings is attached to the Drury record.

The Superior Court reversed each order of the Civil Service Commission, that is, quashed its record in each case. From each judgment of the Superior Court the Civil Service Commission appealed to the Supreme Court of Illinois, the highest tribunal of that state, and separate records were there filed, except that, the transcript of proceedings appeared in the William J. Drury record only.

The Supreme Court of Illinois held that the cases presented no grounds for a direct appeal to that Court by respondents and transferred the appeals to the Appellate Court of Illinois for the First District thereof for disposition (see *Drury* v. *Hurley*, 402 Ill. 243; *Connely* v. Hurley, 402 Ill. 236).

The cases were heard together in the Appellate Court and the judgments of the Superior Court were aech reversed. One full opinion was rendered in the *William J. Drury* case disposing of the questions presented and a memorandum opinion only was filed in the *Thomas E. Connely* case adopting the opinion in the *Drury* case. (*Drury* v. *Hurley*, 339 Ill. App. 33; *Connelly* v. *Hurley*, 339 Ill. App. 54).

Petitions for leave to appeal from the judgments of the Appellate Court were filed by petitioners in the Supreme Court of Illinois, which court, upon consideration thereof, denied leave to appeal in each case thereby leaving the judgments of the Appellate Court as the court of last resort.

Separate records are filed here but for convenience of this Court one petition is here filed applicable to both cases.

SUMMARY STATEMENT OF MATTER INVOLVED.

Lieutenant William J. Drury and Captain Thomas E. Connelly of the Chicago Police force, were discharged by order of the Civil Service Commission of Chicago on the sole ground that, though admittedly acting in good faith, and innocent of wrongdoing, they had refused to sign an immunity waiver when brought before the grand jury of Cook County, Illinois, by a hostile State's Attorney, actively seeking their indictment upon testimony of known perjurers, where petitioners were the subject of inquiry.

The Civil Service Commission held that petitioners had the right "to refuse to sign an immunity waiver and thus claim the constitutional privilege against self-incrimination" but concluded that

> "it is fundamentally inconsistent with the duties of a police officer to refuse to sign an immunity waiver in advance of testifying before a grand jury or a court in a criminal case" (Drury Abstract, 42).

The Superior Court of Cook County granted certiorari and quashed each of the records on authority of *In re Holland*, 377 Ill. 346, where it was held that an effort of a hostile State's Attorney to turn the grand jury investigation against the witness and investigate him, instead of the supposed crime, was just cause for refusing to sign an immunity waiver and resisting the effort of the State's Attorney to incriminate him.

The Appellate Court of Illinois for the First District thereof, pointedly held:

> "A police officer by reason of his special status, duties and responsibility may not invoke his constitution-

al privilege against self incrimination in matters touching upon his occupation without being guilty of a breach of duty on his part by reason of such refusal."

Factual History of Matters Involved.

Petitioner William J. Drury was a Lieutenant of Police of the City of Chicago and Thomas E. Connelly was a Police Captain, each with a long and honorable record of service.

In the latter part of September, 1946, Lieutenant Drury and Captain Connelly were assigned by the Commissioner of Police to the investigation and solution of about eighty unsolved Chicago murders among which was the James M. Ragen murder.

Drury and Connelly selected for immediate investigation the highway racketeering murder of said Ragen owner of a National Racing News Service who, while driving his automobile on one of Chicago's Streets, was shot by assasins in gangland fashion from a waylaying truck.

Petitioners have extraordinary and exemplary police service records and are known throughout hte United States for the relentless war on the national crime syndicate.

Petitioner WILLIAM DRURY in twenty-six years of police service arrested more gun-carrying gansters than any other single Chicago policeman. He holds the LAMBERT TREE Gold Medal for bravery, the highest award in the Police Department for killing an armed ex-convict who tried to assassinate him (Drury) in a street robbery. He also was the recipient of thirteen EXTRA AWARDS OF COMPENSATION and many credible mentions for extremely commendable and efficient police work. He has been sued, transfererd, "benched" shot at, received threatening phone calls, has been harrassed at all hours at his home by gangsters. After making important gangster arrests he has been illegally and unlawfully suspended twice from the Police Department. He was repeatedly reinstated.

Petitioner THOMAS CONNELLY has been a partner to Petitioner DRURY and together they are known as "the Watch Dogs of Chicago's Loop". Their presence on any given beat has been publicly acclaimed as meaning the exodus of gangsters and hoodlums in that area.

Petitioner CONNELLY was the recipient of six EXTRA COMPENSATIONS for meritorious services. He has received fifteen creditable mentions for extraordinary and efficient police service.

During the next several months Drury and Connelly worked actively on the Ragen case under the direction of the Commissioner of Police, reported to him frequently, keeping him accurately advised as to their progress.

Previous, on July 8, 1946, William J. Tuohy, State's Attorney, and Wilbert F. Crowley, First Assistant State's Attorney, of Cook County, Illinois, then investigating the Ragen murder, questioned Jack Guzik, an underworld character reputedly with gambling connections, and suspected of implication in said crime, and who had formerly been convicted of a Federal income tax violation. Guzik denied any knowledge of the Ragen shooting.

On November 25, 1946, and during their investigation of the Ragen case, Lieutenant Drury and Captain Connelly saw Guzik near 21 East Adams Street, Chicago, Illinois, and arrested him. This arrest appears to have been spontaneous and unplanned and was made around 2 P.M. on that day.

News of Guzik's arrest was flashed to his counsel and a habeas corpus petition was immediately filed on Guzik's behalf in the Criminal Court of Cook County. After a hearing at which the State was represented by the State's Attorney, Guzik was released by order of the Criminal Court of Cook County, Illinois at 4:00 P.M. on the same day for lack of evidence justifying his further detention.

As Guzik was leaving the Court room he said to Drury, referring to Drury and Connelly "I will get the both of you fired" (Drury, Record 2003; Connelly, Record 1592).

Thereupon a local newspaper carried the story of a purported interview with a Chicagoan prominant in crime prevention activities, which by implication involved a criticism of the State's Attorney's office for the speed with which Guzik had been released.

State's Attorney Tuohy thereupon called the Commissioner of Police and requested that Lieutenant Drury and Captain Connelly be sent to his office on the morning of November 27, 1947. These officers were not working out of the State's Attorney's office nor under his direction but solely and directly under the Commissioner of Police. Pursuant to the order of the Commissioner they went to the office of the State's Attorney.

Upon their arrival at the State's Attorney's office each was separately questioned, with a court reporter at hand chiefly as to Guzik and his possible connection with the Ragen shooting or other violations of law, from which it became evident that petitioners had no evidence as to Guzik's connection with the Ragen murder.

At the conclusion of the formal questioning of each police officer there was some off-the-record heated discussion. Mr. Tuohy testified that when Captain Connelly got up to leave Connelly said, that he supposed that he was in bad because of a former suspension which the Appellate Court had reversed, and that he, Tuohy, replied:

> "Just a moment, Captain, I had nothing to do with your former suspension and it has nothing to do with this hearing. Just remember this, that if I should ever have occasion to take you or any other police officer to the Trial Board, I will have the evidence that will make the charges stick."

Captain Connelly testified that State's Attorney Tuohy said to him that he had better watch his step or "I'll take you before the trial board and fire you, and you won't get back; now, get out, do you hear that." (Connelly, Record 1594).

Captain Connelly promptly repeated this conversation to Lieutenant Drury and soon afterwards they both reported their interviews had in the State's Attorney's office to the

Commissioner of Police who advised both officers not to get excited. Both were obviously disturbed by what seemed to them a gratiutious affront, not calculated to aid them in the solution of this gangland murder, but were told by the Police Commissioner to proceed with their investigation.

Drury and Connelly continued their investigation of the Ragen murder and interviewed, and ultimately were instrumental in obtaining signed statements from, Russell, White and one Davidson who had been at the scene of the Ragen shooting each of whom testified on their first appearance before the Grand Jury on March 14, 1947, that they could identify persons who were in the truck from which Ragen had been shot.

By the commissioner's directions the investigation was carried on with the strictest secrecy and the time for the bringing of the witnesses before the Grand Jury was dictated by the Commissioner of Police. The witnesses were finally brought before the Grand Jury in March, 1947 and an indictment for the murder of Ragen was returned against Block, Patrick and Yaris on March 17, 1947. From then on the matter was in charge of the State's Attorney's office.

Upon their arrest under said indictment Block, Patrick and Yaris employed attorneys Bieber & Brodkin and Morris Meyers as their attorneys. Bieber & Brodkin had represented Jack Guzik in his habeas corpus matter above mentioned. The lawyers promptly interviewed the said

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As further background in consideration of this Petition, the Court is referred to the astounding factual disclosure of the national crime web: "Chicago Confidential" by Jack Lait and Lee Mortimer is a shocking and uncensored account of the truth of Chicago and national crime. The authors maintain that it is a sensational book, but nevertheless true: every statement has been checked and verified. On pages 132, 169, 185, and 233 reference is made to Petitioner Drury. On page page 233 Petitioner CONNELLY is refeired to. In fact, Chapter 29 entitled "The Brave Bulls" is an excellent reportorial presentation of the extraordinary courage and efficient police work by the petitioners.

witnesses to the murder on whose testimony the indictment had been returned and procured affidavits from witnesses Russell and White by which they changed their testimony. Those affidavits were submitted to the State's Attorney and a round of conferrences started between the attorneys for said defendants, the heads of the Police Department of Chicago, and the State's Attorney and his assistants; and beginning about March 28, 1947 news paper articles began appearing indicating that the witness White who had something of a criminal record, and the witness Russell, had recanted their testimony and had said they could not identify any of the participants in the Ragen shooting and further that White claimed that, in obtaining his former testimony, Lieutenant Drury and Captain Connelly had threatened to send him White, back to the penitentiary for a parole violation and had promised him a $5,000 reward if he would identify Block, Patrick and Yaris as such participants and that Russell sad said that they had harassed and threatened him so that finally to get rid of them he had identified pictures shown to him of supposed participants in that shooting.

As Lieutenant Drury and Captain Connelly learned of these reported changes in the stories of White and Russell, they saw the Commissioner of Police from day to day, inquiring about the situation, and asked whether or not he was investigating the matter, but obtained no satisfactory explanation and were told to await developments.

The State's Attorney on April 2, 1947, opened a hearing on the complaint of said witnesses before the same March 1947 Grand Jury commencing at 11:30 A.M. when Russell White and Davidson appeared before the Grand Jury for the second time. Russell, who had previously testified before that body that he could identify Block and Patrick as

participants in the shooting of Ragen; and White, who had previously testified before that body that he could identify Block, Yaris and Patrick as such participants, recanted their former testimony and testified that they could identify no one implicated in the Ragen shooting; but Davidson maintained that he could still identify two of the three alleged participants in that shooting whom he had identified in his earlier testimony before that body.

The Grand Jury adjourned for lunch and were to return for a further session at 3:00 o'clock. Neither Drury nor Connelly had been notified of the hearing on April 2, 1947 of the change of testimony of the witnesses of the Ragen murder or its real purpose, which was to indict Lieutenant Drury and Captain Connelly.

Unknown to either Drury or Connelly, there was then pending before the Grand Jury at the time Drury and Connelly appeared before that body on April 2, 1947, two matters, upon each of which their indictment was being sought;—one, a charge against them of subornation of perjury, and the other a charge against them for conspiracy with the three witnesses Russell, White and Davidson to procure a false indictment of Block, Patrick and Yaris for the murder of Ragen.

When Drury and Connelly arrived at the Criminal Court building there was a tension of excitement about the State's attorney's office; newspaper reporters, photographers, assistants, and others were in the halls of the building; First Assistant Crowley was holding a press conference. Crowley stuck his head out of the door of the conference room and Drury asked Crowley if he wanted to see them and Crowley replied that he would see them before the Grand Jury at 3:00 o'clock. Everyone seemed to know what was going to happen except Drury and Connelly. On

inquiry of a friendly newspaper reporter as to what it was all about they were told that they themselves were the subject matter and that they were going to be indicted by the Grand Jury.

The report of the Civil Service Commissioners states that upon the arrival of Drury and Connelly at the office of the said State's Attorney at about 2:00 P.M. on April 2, 1947 they were told by a newspaper reporter in whom they had confidence that they were about to be indicted by the Grand Jury, and they also spoke to the said First Assistant State's Attorney who told them that he did not wish to see them then but that he would see hem before the said Grand Jury at 3:00 P.M. on said date.

Neither Crowley, Austin nor Tuohy had spoken to Drury and Connelly about the purpose of the Grand Jury hearing at 3 o'clock. Nor did the Commissioner of Police tell them when he directed them to go before the Grand Jury that afternoon that the State's Attorney was seeking to indict them, though obviously the Commissioner knew it. First Assistant Crowley telephoned to Chief of Detectives Storms as soon as he learned that the witness White had given a statement to Morris Meyers changing his testimony and from then on during conferences and examinations of the witnesses the Police Department was represented and the witnesses were represented by the lawyers for the defendants accused of murder, but Drury and Connelly were not present or notified, and they could get no satisfaction from Commissioner Prendergast to whom they complained (Rec. 2050) concerning the handling of the witnesses, and articles in the press. (Drury Abst. 33).

The Commissioners also stated in their decision that the evidence indicates that the respondents Drury and Connelly had reasonable grounds for believing, when they

were takn before the Grand Jury, that thy might be subjected to criminal prosecution.

When the Grand Jury convened again after lunch at 3:00 o'clock the stage was set for the appearance of Drury and Connelly. The Grand Jury had already heard at their morning session the testimony of the three witnesses upon whose testimony the indictment for the murder of Ragen was originally voted, and upon whose testimony the Grand Jury were about to vote upon indicting Drury and Connelly.

The Stage is set.

In the Grand Jury proceedings prior to March 2, 1947 in the Ragen murder case First Assistant Crowley had examined the witnesses. In the proceedings of Mareh 2, 1947, Assistant State's Attorney Richard B. Austin, ace prosecutor (who conducted these proceedings before the Civil Service Commission), examined the witnesses. Mr. Crowley, First Assistant was present in the Grand Jury room, and participated in the proceedings.

Neither Crowley, Austin nor Tuohy had spoken to Drury and Connelly prior to the 3 o'clock hearing before the Grand Jury, concerning the witnesses, evidence, or purpose of the hearing, although it was customary to do so.

Captain Connelly was first called before the Grand Jury, sworn, asked preliminary questions of identification, and dramatically asked if he would sign an immunity waiver which was read aloud to him by Mr. Austin before the Grand Jury; but the purpose of his testimony was not disclosed to him. When he replied that he would not sign an immunity waiver without seeing the Commissioner of Police, he then was told to wait outside. The procedure was the same for petitioner Drury.

Each declined upon the ground that he wished first to see and consult his commanding officer, the Commissioner of Police, or to obtain his permission, or direction to the signing of immunity waivers.

The Commissioner was then hastily summoned before the Grand Jury and upon being informed of the refusal to sign such waivers and the circumstances thereof, stated to that body that his consent thereto was not required.

He then retired and told the two police officers that his consent to the signing of such waivers was not necessary but that if they needed it they had it. At this time Captain Connelly and Lieutenant Drury asked the Commismisioner what was meant by their being asked to sign immunity waivers and if he had learned what had transpired and who, as they put it, had tampered with their witnesses, to which he replied that he could not explain it. And the Commissioner offered no explanation.

Upon again being called before the Grand Jury in turn each of the two police officers stated that the Commissioner had given his consent, but each still refused to sign an immunity waiver and was excused without questioning.

The Commissioner then requested to be permitted to appear again before that body upon learning that the police officers still refused to sign the waivers in question, and stated to the Grand Jury that he would suspend them, which he promptly did, immediately that he went into the ante-room where Drury and Connelly were.

Both police officers had on March 17, 1947 appeared before the same Grand Jury and had testified fully as to their knowledge of the Ragen shooting, on which occasion neither had been asked to sign an immunity waiver. However, as matters developed they had, upon their second appearance was being sought in an effort to indict them.

Grand Jury Votes a No Bill.

After Drury and Connelly had been excused without being asked any questions except to identify themselves, and whether they would sign an immunity waiver, the Grand Jury proceeded to consider the evidence upon the two charges against Drury and Connelly and voted a no-bill as to the charge of subornation of perjury against Lieutenant Drury and Captain Connelly and also voted a no-bill as to the charge against them and Russell, White and Davidson of conspiring to procure a false indictment of Block, Patrick and Yaris for the murder of Ragen.

That day following the action of the Grand Jury there were conferences between State's Attorney Tuohy and his assistants as to what should further be done.

The next morning Mr. Tuohy took personal charge of the further proceedings and visited Judge Ward then Chief Justice of the Criminal Court and conferred with him about bringing contempt proceedings against the two witnesses who changed their testimony before the Grand Jury and from there went before the Grand Jury to request them to hold themselves in readiness to appear befor the Chief Justice when contempt charges might be heard. In talking to the jury he told them that perjury was hard to prove because of doubt as to which of their two stories might be true; he was asked by a grand juror whether they were free to reconsider their action in voting a no-bill on the conspiracy charge the day before.

Mr. Tuohy first said he did not know but upon being told that the no-bills had not formaly returned to the court, advised the Grand Jury, as a body, that it could still reconsider its action thereon, which it did, and later that day returned an indictment against Lieutenant Drury, Captain Connelly, Russell, White and Davidson for conspiracy to

procure a false indictment of Block, Patrick and Yaris for the murder of Ragen. The charges in that indictment were of the same general import as the conspiracy charges filed with the Civil Service Commission against Lieutenant Drury and Captain Connelly, and which the commissioners dismissed at the conclusion of the trial.

The Grand Jury having returned the indictment sought by State's Attorney Tuohy, he done nothing about the contempt proceedings concerning which he had seen the Chief Justice and about which he had spoken to the Grand Jurors, his objective having been obtained.

On April 3, 1947 prior to the return of the indictment against Drury, Connelly, Russell, and White, State's Attorney Tuohy, personally moved the Criminal Court to nolle prosse the indictment against Yaris, Block and Patrick, the three alleged murderers of Ragen, and that indictment was nolle prossed, and later in the day the three alleged murderers were released from custody, and the Grand Jury later in the day then returned the indictmnt for conspiracy against Drury, Connelly and the three witnesses. Tuohy said that the indictment against Yaris, Block and Patrick was nolle prossed as soon as he felt that "my witnesses would not produce a conviction of Block" (Rec. 3122), who, he said, was a long ways from being eliminated as "having had a piece of this Ragen killing." (Rec. 3121). And Tuohy admitted that Davidson had never changed his statement to the Grand Jury that Block, Yaris and Patrick were the three killers (Rec. 3123). Tuohy gave as his reason that he thought Block had a part in the Ragen murder but did not "want him to be put in jeopardy in a case I thought would result in acquital" (Rec. 3126).

When the indictment against Yaris, Block and Patrick,

the alleged murderers, was nolle prossed they were represented by Attorneys Bieber, Brodkin and Morris Meyers, the attorneys who secured affidavits from the witnesses Russel and White by which they changed their testimony; and they were present in the State's Attorney's office together with lawyers and witnesses, and First Assistant Crowley before the April 2 hearing before the Grand Jury. Messrs. Bieber and Brodkin were the attorneys for Jack Guzik in the Habeas Corpus proceeding to release him from the arrest made by Drury and Connelly (Drury Abst. 96-99), and Bieber and Brodkin and Morris Meyers represented Yaris, Block and Patrick at the time State's Attorney Tuohy personally nolle prossed the indictment against them on March 3, 1947 before the indictments were returned against Drury and Connelly (Rec. 2896).

The statement of the Commissioners says (Drury Abst. 36) that State's Attorney Tuohy testified that it was the practice of his office to question every accused before a case goes to the Grand Jury, if there is an opportunity to do so, and that though doubtless present, such an opportunity was not given either to Lieutenant Drury or Captain Connelly after White and Russell changed their stories and prior to the second appearance of the two police officers before the Grand Jury or their indictment by that body.

The indictment voted against Drury, Connelly, Russell, White and Davidson for conspiracy to indict Yaris, Block and Patrick by the Grand Jury after reconsideration of their vote of a no-bill upon the same day voted, April 3, 1947.

The case was docketed and called by the Chief Justice on Tuesday April 8, 1947 when White and Russell the witnesses who had recanted pleaded guilty. Drury, Con-

nelly and Davidson pleaded not guilty. Drury and Connelly demanded trial. By order of Court the case was continued and set for May 12, 1947. A trial was demanded at each term of court thereafter, commencing with the April term. It was finally nol prossed on July 30, 1947, the last day for trial within the four month rule.

The Civil Service Commissioners in their decision say that after a number of continuances at the instance of the State's Attorney, in the face of demands for trial by defendants, this conspiracy indictment was on July 30, 1947, nolle prossed upon his motion, White having in the meantime died about the middle of June, 1947, as the result of a shooting.

While said indictment was pending for trial these proceedings were commenced on April 24, 1947 and continued from time to time and the hearing of evidence commenced on August 13, 1947. The State's Attorney sought vainly to have these proceedings heard before the trial under the Criminal Court indictment (Rec. Vol. 1, pp. 439-454), could be held and while that indictment was pending.

The State's Attorney assigned Richard B. Austin one of his able prosecutors to the trial of these proceedings and he was permitted by the commission to carry on the trial proceedings, which he did.

Specific findings of the Commission as deduced from the evidence, applicable here to both petitioners are as follows: (In the Drury case)

> (22) The respondent had on March 17, 1947 appeared before the said Grand Jury and had testified fully as to his knowledge of the shooting of Ragen and had not on that occasion been asked to sign an immunity waiver in advance of testifying before that body.

(23) As matters developed, upon the respondent's appearance before the said Grand Jury on April 2, 1947, he had reasonable grounds for believing that his testimony might be sought in an inquiry as to his own conduct in the investigation of the Ragen case and that he might be subjected to criminal prosecution as to matters pertaining thereto.

(24) On April 3, 1947, the Grand Jury returned an indictment against the respondent and Connelly, the said Russell, the said White and the said Davidson for conspiracy to procure a false indictment of the said Block, the said Patrick, and the said Yaris for the murder of Ragen.

(25) The evidence herein is insufficient to warrant a finding that the respondent was guilty of the charges of, between November 15, 1946 and March 19, 1947, unlawfully, wilfully and maliciously conspiring and agreeing with Connelly, the said White and the said Russell, to the end that indictments for the offense of murder be caused, procured and charged against the said Yaris, the said Block, and the said Patrick or of unlawfully, willfully, knowingly and maliciously persuading and inducing the said Russell upon March 12, 1947, to falsely identify and point out at the Detective Bureau of the City of Chicago, the said Block as a participant in the killing of Ragen on June 24, 1946, all as charged herein, and that such charges as filed herein against the respondent should be and such charges hereby are dismissed.

(26) By reason of the action of the respondent, when he appeared before the said Grand Jury on April 2, 1947, in refusing, as he did, to sign an immunity waiver, even though he had the consent of his superior officer, the Commissioner, the respondent was guilty, as charged herein, and contrary to law and the rules of the Police Department of the City of Chicago, of conduct unbecoming a police officer and an employee of the said Department of Police.

(27) Because of the findings of fact and of guilt

> herein cause exists for the discharge and removal of the respondent as a Lieutenant of Police in the Department of Police of the City of Chicago, and as a member of such department and from the service of the City of Chicago.

and, therefore, it is hereby ordered that the respondent, William J. Drury, be here, and now discharged and removal from his said position as a Lieutenant of Police in the said department of Police, and as a member of such department, and from the service of the City of Chicago.

The order was carried out by the Commissioner of Police in due course. (The same findings and order were filed in the Connelly case).

On November 3, 1947 petitioners filed a complaints for certiorari in the Superior Court of Cook County to review the record of the Civil Service Commission and a full record with all evidence and exhibits, was returned to the Court.

Upon a full hearing the Superior Court quashed the return and reversed the order of the Commission, holding in effect that the principles announced in *In re Holland,* 377 Ill. 346, were controlling in this case.

At the conclusion of the certiorari hearing Judge Sbarbaro filed a written opinion in which he stated his viewpoint. He said.

> "This court cannot agree with the Commission, as a matter of law that the refusal of the plaintiffs (Drury and Connelly) to waive their constitutional privilege in advance of testifying, constitutes cause for removal. To agree with the Civil Service Commission's interpretation of the law is to accord the constitutional privilege to the guilty and deny it to the innocent." (Drury Abst. 131).

Judge Sbarbaro further commented upon the sufficiency of the record, saying:

> "The plaintiffs Drury and Connelly have never refused to give evidence concerning any crimes of which they may have knowledge. The charge that they unlawfully conspired to procure indictments was specifically dismissed by the Commission. Since they have been specifically absolved from any wrongdoing, how can stigma attach concerning their refusal to sign an immunity waiver regarding these matters? It is to be further noted that the record returned by the defendants discloses no provision of any law, ordinance, rule or regulation requiring a police officer to waive immunity. * * * To permit a record such as the one returned in this cause to stand would deprive the plaintiffs of their constitutional rights and do violence to the provisions of Section 12 of the Civil Service Act, prohibiting removal except for cause." (Drury Abst. 130-132).

The Superior Court, having quashed the return of the Commission to the certiorari writ,an appeal by the Commission was taken direct to the Supreme Court of Illinois where it was argued. The Supreme Court transferred the two appeals to the Appellate Court, First District, for determination (402 Ill. 236, 243).

The Appellate Court after hearing reversed the judgment of the Superior Court, commended the decision of the Commissioners, held, without qualification, that a policeman was guilty of conduct unbecoming a police officer if he refused to sign an immunity waiver, and that such conduct was "cause" for dismissal from the service, and that the Commissioners were entitled to decide what constituted "cause" for dismissal. (339 Ill. App. 33, 54.)

No surrounding, extenuating, or excusing, circumstances were considered or discussed in the opinion of the Appellate Court.

Jurisdiction.

The jurisdiction of this court is invoked under Title 28, United States Code Sections 1257 and 2101.

The Supreme Court of Illinois is the highest judicial tribunal of the State of Illinois, and by its denial of said petition for leave to Appeal the judgment of the Appellate Court of Illinois became final, and Certiorari from this court to review said judgment if allowed issues direct to the said Appellate Court of Illinois First District, at Chicago, Illinois (*Davis* v. *Aetna Acceptance Co.,* 293 U.S. 328 reversing 273 Ill. App. 628).

The claim of constitutional immunity against self incrimination was made by each officer when he refused before the Grand Jury to sign an immunity waiver (Drury Abstract 188). The report of the Civil Service Commission shows the claim of constitutional immunity against self-incrimination was made before them and that they ruled against the claim and held that a policeman could not refuse to sign away his constitutional guarantee and yet hold his position (Drury Abst. 43-44). Notwithstanding they were the subject of inquiry.

In a petition for rehearing filed before said Civil Service Commission it was urged in paragraphs 11, 12, 13, 14 and 18, thereof that the rights of petitioners under the Fifth Amendment to the United States constitution were violated by the ruling, findings and order of the Civil Service Commission, and was raised in the petitions for Certiorari in the Superior Court of Cook County (Drury Abst. 66, 67). And in paragraph 14 thereof it was pointed out that rights had been accorded to a lawyer and denied to petitioners as policemen.

The Superior Court of Cook County was asked to quash the record of the Civil Service Commission upon the ground that it violated the Fourteenth Amendment to the United States Constitution (Drury Abstract 119). And in reversing and quashing the return and record of the Civil Service Commission the Judge in his opinion held that the discharge because of refusal to waive the constitutional right against self-incrimination under the instant circumstances was not warranted (Drury Abstract 131).

The Appellate Court in its opinion the findings of the Commission and the opinion of the Superior Court Judge all recognize that the constitutional question was argued before it.

Question Presented.

I

Could a refusal to sign a waiver of constitutional guaranty against self-incrimination at the time petitioners were sworn to testify before a grand jury in a proceeding being used by a hostile states attorney to procure their indictment on a charge of which they were innocent, be made a cause for discharge from a Civil Service position as conduct unbecoming an officer.

II

May a Civil Service Commission by action or ruling make a refusal to waive immunity from self-incrimination guaranteed by the constitution a "cause" for discharge where there is no departmental rule, ordinance, statute, judicial decision, or constitutional provision authorizing such a holding?

III.

Where a legislature has made no law requiring public officials to waive immunity against self-incrimination when called before a grand jury when inquiring into public matters, is it a denial of equal protection of the law, and class legislation, for a Civil Service Commission to fix as a "cause" for dismissal, and to dismiss, a policeman who has refused to waive immunity when the legislature has fixed no standard, no defined cause in the premises?

IV.

Where a general law may be made applicable to all persons and officers similarly situated as are policemen as public officials requiring them to waive immunity when called as witnesses before an inquisitorial body examining into public matters affecting their employment, is it class legislation and a denial of equal protection of the law for a Civil Service Commission vested with power to discharge for "cause," to treat the refusal by a policeman to waive immunity when so called to testify as a cause and discharge him?

Reasons for the Allowance of the Writ.

I.

This is the only decision in the several states so far as found where it has been flatly decided and without exception for circumstance, that it is a breach of duty for a policeman where no rule, law or constitutional provision exists requiring it to invoke the constitutional privilege against self-incrimination.

II.

Because the cases are not in harmony this court should review these cases at bar and establish the reasonable rule and its exceptions for the guidance of public officials and the protection of thousands of policemen in their positions and pension rights, and the rights of others similarly situated. If the judgment of the cases at bar are to stand in judicial literature they destroy the constitutional protection against self-incrimination to every policeman and persons with like duties and obligations, thus nullifying that provision of the constitution.

III.

By the judgment of the Illinois Appellate Court the whole basic philosophy of protection to persecuted innocence afforded by the Fifth Amendment is abandoned so far as policemen are concerned. By that ruling, no matter how unfounded the inquiry or how tyrannical the enforcing agency, a police official may shelter his innocence by invoking the basic guarantee against self-incrimination only at the expense of being wrongfully and arbitrarily removed from his office and all that goes with a long and honorable service.

IV.

The legislature of Illinois has given to the Civil Service Commission of cities a blanket power to determine what shall be "cause" for a discharge by virtue of which power the Civil Service Commission of Chicago has held specifically that if a policeman does not waive immunity when called before a grand jury he is guilty of conduct unbecoming an officer for which he may be discharged for

"cause"; which makes the decision of the commission one made at discretion like the verdict of a jury. In effect it denies equal protection of the laws as one day it may be one way and the opposite the next.

V.

The ruling of the Appellate Court of Illinois is not based upon any official order, departmental rule, statute or constitutional provision but solely upon the conveniently contrived "special status, duties and responsibility" of a police officer. It denies to such police officer protection under the Fifth Amendment upon any conceivable ground; good faith and innocence being brushed aside as of no importance.

No other case that can be found goes so far.

There is no case in the books involving a policeman appearing to have been adjudicated upon such general ground as that taken by the Appellate Court of Illinois. There are cases supported by departmental rules, statutes, and constitutions as follows:

A.

Christel v. *Police Com. of San Francisco,* 33 Cal. App. (2d) 564, 92 Pac. 2d 416, (1939), is a case involving an investigation of the San Francisco police department, the officer had refused to testify before the Grand Jury, claiming his constitutional privilege. He was discharged under a departmental rule that required testimony without reservation before a grand jury. He was discharged against the claim that the rule was invalid, upon the ground of unbecoming conduct. The order of discharge was there affirmed.

In *Cateline* v. *McClellan,* 282 N. Y. 166, 25 N. E. (2d) 972, (1940), it there was in question conduct of policemen prior to the effective date of a new constitution which provided for discharge of public officials who should refuse to sign immunity waivers. It was held that the constitutional provision was retrospective, and valid as to the matters ante dating the new constitution.

B.

In *Goldwyn* v. *Board of Higher Education,* 37 N. Y. S. (2d) 34 (1942), a high school teacher refused to sign an immunity waiver when summoned to appear before a Joint Inquisition Committee. She was not sworn and was discharged under a provision of the New York charter which so provided. The court approved.

C.

Exceptions to the cases involving constitutions, statutes, and rules have been noted in cases involving lawyers where before the Grand Jury, Court, or Committee, their own conduct became or was the subject of inquiry.

In the case of *In re Grae,* 282 N. Y. 428, 26 N. E. (2d) 963, an inquiry had been ordered by the Appellate Division of the New York System of Courts into alleged unlawful and unethical practices ("ambulance chasing", solicitation, etc.,) impairing the administration of justice, and Michael H. Grae, an attorney, was called before a Special term of the Supreme Court designated to conduct the inquiry. He refused to waive immunity but did not refuse to testify. For such refusal he was ordered to be suspended from practice for six months for conduct prejudicial to the administration of justice. Grae had justly feared an unfriendly attitude of individuals back of the movement and being innocent refused to sign an immunity

waiver. The court said that "the privilege against self-incrimination is a constitutional guaranty of a fundamental personal right," and that in refusing to sign an immunity waiver Grae "was within his legal right," and that the disciplinary proceeding "wherein the single offense charged is his refusal to yield a constitutional privilege, is unwarrantable".

In the case of *In re Holland,* 377 Ill. 346, Holland a judge of the Municipal Court of Chicago had refused to sign an immunity waiver but testified in the grand jury investigation of the gangster murder of one O'Hare with whom Holland had had some business dealings. Holland answered all questions as to O'Hare death but became impressed with the thought that the State's Attorney, admittedly hostile, was set upon investigating him instead of he O'Hare murder and hereupon refused, upon constitutional grounds, to answer questions concerning his personal matters with O'Hare. The Chief Justice of the Criminal Court refused to hold Judge Holland in contempt. Whereup the Chicago Bar Association commenced a proceeding in the Supreme Court of Illinois to have Judge Holland disciplined, claiming that he was lacking in good faith when he claimed constitutional immunity.

The Supreme Court stated the contention of the Chicago Bar Association in these words:

> "As we understand the position of Amicus Curiae it is a lawyer though possessing this privilege accorded by the constitution, has nevertheless an overshadowing duty to refuse to exercise it in a case such as this, and that his failure so to refuse renders him subject to discipline." (p. 352)

The Illinois Supreme Court of that doctrine said:

> "To make the general charge that the claimant of such a right is guilty of contumacious conduct if he does

not recognize as controlling those surrounding principles and forsake his right, is to measure him by an ideaism which itself may oftimes resut in injustice, a result neither legally nor morally justified. * * * The right given by the constitution being legal, is as well a moral right, since the public pionnt of view can scarcely be said to include that which is not moral. (p. 353).

D.

The question of classification that determines whether a person is denied the equal protection of the law does not depend so much upon the name of the official as it does upon the duties and character of the office he fills; a policeman is only one of a great class of public servants and characters, all of whom are similarly situated so far as waiver of immunity is concerned.

Specifications of Errors.

I.

The Appellate Court of Illinois erred in reversing the judgment of the Appellate Court.

II.

The Appellate Court of Illinois erred in holding that:

> "A police officer by reason of his special status, duties and responsibility may not invoke his constitutional privilege against self incrimination in matters touching upon his occupation without being guilty of a breach of duty on his part by reason of such refusal."

III.

The Appellate Court of Illinois erred in denying to petitioners their irghts as United States Citizens under the Fifth and Fourteenth Amendment to the Constitution of the United States.

Opinion of the Appellate Court of Illinois.

The opinion of the Appellate Court in *Drury* v. *Hurley, et al*, is to be found at page 215 of the transcript in *Drury* v. *Hurley, et al*; and that of *Connelly* v. *Hurley, et al*, is at page 149 of the transcript of that record; the printed opinions appear as *Drury* v. *Hurley*, 339 Ill. App. 33 and *Connelly* v. *Hurley*, 339 Il. 54 (as shown in advance sheets of those opinions). The printed opinions of the Supreme Court of Illinois rendered in transferring those cases to the Appellate Court are *Drury* v. *Hurley*, 402 Ill. 243, and *Connelly* v. *Hurley*, 402 Ill. 236.

Date of Final Order.

The date of the final order of the Supreme Court of Illinois denying leave to appeal is January 12, 1950.

On April 5, 1950, Mr. Justice Minton entered an order extending the time within which to file this petition to April 27, 1950, in each case.

Prayer.

Wherefore petitioner prays that the court allow this petition for a Writ of Certiorari and order that the writ be granted to renew the said judgment of the Appellate Court of Illinois for the First District.

Luis Kutner,
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Chicago, Illinois
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The unrestrained holdings of the Civil Service Commission of Chicago are in violation of the Fifth Amendment to the United States Constitution and fall within the protecting scope of the Fourteenth Amendment to the United States Constitution which forbids the denial of equal protection of the laws to United States Citizens.

Argument, *post* 33.

II.

The holding of the Appellate Court of Illinois that no policeman under any circumstances may refuse to waive immunity before a grant jury and yet retain his office, is an unjust discrimination and denies equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Argument, *post* 35.

III.

A police officer who is summoned before a Grand Jury and who has just reason to suspect, fear, or believe that the public prosecutor is hostile to him, and seeking unjustly to indict and embarrass him, may of right decide for himself whether or not he will exercise his constitutional privilege, and refuse to waive immunity without violation of any duty of his office.

Argument, *post* 37.

IV.

Unless the circumstances are such as to require, in honesty and good conscience, that a right or privilege be waived, the possessor of such right be he judge, lawyer or layman is neither legally or morally guilty of a wrong in claiming that right. (From Syllabus, In re Holland, 377 Ill. 346.)

Argument, *post* 42.

V.

There is no legitimate basis for the blanket ruling of the Appellate Court that no policeman can refuse to sign an immunity waiver, no matter what the circumstances may be, and the rule here sought to be enforced applies to all public officials and should not be made for policemen alone, as such application is discriminatory and denies equal protection of the law.

Argument, *post* 51.

ARGUMENT.

I.

The unrestrained holdings of the Civil Service Commission of Chicago are in violation of the Fifth Amendment to the United States Constitution and fall within the protecting scope of the Fourteenth Amendment to the United States Constitution which forbids the denial of equal protection of the laws to United States Citizens.

The constitutional provision against compulsory self-incrimination has no expressed exceptions. But in the flow of time certain exceptions have been engrafted upon it. Departmental rules, ordinances, statutes, and even constitutions, have provided that certain public officials are not permitted to claim exemption from self-incrimination when called before bodies investigating the operation of departments, systems of government and crimes generally.

Under a departmental rule a San Francisco policeman was discharged for refusing to testify under his claim of privilege. Under the New York Constitution officials were barred from claim of immunity when their acts were the subject of investigation and under that provision, certain policemen were held to answer as against the claim against self-incrimination. And under a charter provision of New York City a school teacher was discharged because of her refusal to sign an immunity waiver.

All of those provisions and laws are based upon a principle and their application is not uncertain. In Illinois there is no rule, ordinance, law or constitutional provision, hence

whatever is done by a Civil Service Commission by way of tacking exceptions upon the constiutional exemptions from self-incrimination, must be as broad as a law would be, that is based upon principle. As the decisions now stand in Illinois the Appellate Court has ruled flatly that a policeman, however innocent and pursued by hostile prosecutors, may not avail himself of the privilege against self-incrimination if he would hold his office; while on the contrary the Supreme Court of Illinois and the New York Court of Appeals have ruled that a lawyer likewise pursued may refuse to testify when he sees that the public prosecutor is after him in a hostile way and he is innocent of wrongdoing. Obviously the policeman is being discriminaed against if it is to be understood that innocence and good faith of the policeman, and hostile and malicious conduct of a prosecutor, does not create an exception for the policeman as well as the lawyer. There can be no equal protection of the laws under such conflicing rulings. One element of the constitutional guaranty under the decision of the Appellate Court of Illinois, and the power of the Civil Service Commission to make the law fit the whim of the moment is a ready tool to accomplish that end.

We respectfully suggest that if the Opinion of the Appellate Court of Illinois is to stand as the law, then the constitutional provision that no person shall be compelled to be a witness against himself is whittled down to the whim of subordinate bodies without any legislative standard to guide their decision; and, when, under guise of unrestrained power they make class rulings, they deny equal protection of the laws, their acts fall within the protecting scope of the Fourteenth Amendment to the United States Constitution.

Without some guide or chart from the legislature a Civil Service Commission under Illinois law may excuse one of-

II.

Because the cases are not in harmony this court should review these cases at bar and establish the reasonable rule and its exceptions for the guidance of public officials and the protection of thousands of policemen in their positions and pension rights, and the rights of others similarly situated. If the judgment of the cases at bar are to stand in judicial literature they destroy the constitutional protection against self-incrimination to every policeman and persons with like duties and obligations, thus nullifying that provision of the constitution.

III.

By the judgment of the Illinois Appellate Court the whole basic philosophy of protection to persecuted innocence afforded by the Fifth Amendment is abandoned so far as policemen are concerned. By that ruling, no matter how unfounded the inquiry or how tyrannical the enforcing agency, a police official may shelter his innocence by invoking the basic guarantee against self-incrimination only at the expense of being wrongfully and arbitrarily removed from his office and all that goes with a long and honorable service.

IV.

The legislature of Illinois has given to the Civil Service Commission of cities a blanket power to determine what shall be "cause" for a discharge by virtue of which power the Civil Service Commission of Chicago has held specifically that if a policeman does not waive immunity when called before a grand jury he is guilty of conduct unbecoming an officer for which he may be discharged for

"cause"; which makes the decision of the commission one made at discretion like the verdict of a jury. In effect it denies equal protection of the laws as one day it may be one way and the opposite the next.

V.

The ruling of the Appellate Court of Illinois is not based upon any official order, departmental rule, statute or constitutional provision but solely upon the conveniently contrived "special status, duties and responsibility" of a police officer. It denies to such police officer protection under the Fifth Amendment upon any conceivable ground; good faith and innocence being brushed aside as of no importance.

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II.

The holding of the Appellate Court of Illinois that no policeman under any circumstances may refuse to waive immunity before a grant jury and yet retain his office, is an unjust discrimination and denies equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Argument, *post* 35.

III.

A police officer who is summoned before a Grand Jury and who has just reason to suspect, fear, or believe that the public prosecutor is hostile to him, and seeking unjustly to indict and embarrass him, may of right decide for himself whether or not he will exercise his constitutional privilege, and refuse to waive immunity without violation of any duty of his office.

Argument, *post* 37.

IV.

Unless the circumstances are such as to require, in honesty and good conscience, that a right or privilege be waived, the possessor of such right be he judge, lawyer or layman is neither legally or morally guilty of a wrong in claiming that right. (From Syllabus, In re Holland, 377 Ill. 346.)

Argument, *post* 42.

V.

There is no legitimate basis for the blanket ruling of the Appellate Court that no policeman can refuse to sign an immunity waiver, no matter what the circumstances may be, and the rule here sought to be enforced applies to all public officials and should not be made for policemen alone, as such application is discriminatory and denies equal protection of the law.

Argument, *post* 51.

ficer one day and discharge another the next for the same "cause", thereby making "cause" a sliding scale whereby to reward party loyalty one day and punish civil virtue the next; whereby the power to define "cause" with the decision of each charge against an officer or employee, the Commission has at hand the means by which to effectively and promptly deny equal protection of the law.

II.

The holding of the Appellate Court of Illinois that no policeman under any circumstances may refuse to waive immunity before a grand jury and yet retain his office, is an unjust discrimination and denies equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Civil Service is established for cities in Illinois by Statute and power vested in Mayors to appoint a board of three Commissioners who have power to classify positions and make rules to carry out purposes of the Act. Section 12 of that Act (An Act to regulate the Civil Service of Cities, Ill. Rev. Stat. Ch. 24½) provides that no officer or employee in the classified service appointed under the rules

> "shall be removed or discharged except for cause, except upon written charges and after an opportunity to be heard in his own defense".

The word cause is not defined so what constitutes cause becomes a question of law upon the admitted facts with each new decision of the Commission; but the court is not bound by the finding of the Civil Service Commission as to what the Commission may think the law is.

As the legislature of Illinois did not define the word "cause", in vesting Civil Service Commissioners of Cities with power to remove officers for cause, the Civil Service

Commission is left to act without regard to discretion, in the legal sense, and only the conscience of the Commissioners is its guide. Here the Commission in fact legislated and made a law for policemen only. And the Appellate Court of Illinois in confirming that ruling has singled the policemen out as one group who may not enjoy he constitutional privilege against self-incrimination. There are many other public officials who in principle occupy the same type of duty, and of trust and confidence as does the policeman. The singling out of policemen by the Civil Service Commission is a piece of class legislation that is beyond their power or jurisdiction both to make and then to enforce.

Not only is the ruling of the Civil Service Commission class legislation but it is a denial of equal protection of the laws.

There are now two lines of decision in Illinois. The case of *In re Holland,* 377 Ill. 346 where a lawyer who was under attack by a hostile State's Attorney was allowed to have advantage of the rule against self-incrimination, and the Appellate Court decision in these cases where a policeman, also under attack by a hostile State's Attorney, was denied the same privilege. And the Civil Service Commission is able to decide either way.

This discrimination was protested against before the Commission and on trial in the courts. The Superior Court judge held that the rule laid down in the *Holland* case was correct and he quashed the records of the Civil Service Commission. But now by virtue of the decision of the Appellate Court of Illinois there are two decisions, one allowing the privilege, the other denying it. By the Appellate Court decision pettiioners are denied the equal protection of the laws as well as singling them as a class and making law for them alone, and not for others similarly situated.

The result here is that the ruling of the Civil Service Commission, and judgment of the Appellate Court confirming it, violate the Fourteenth Amendment to the United States Constitution in that it denies to petitioners the equal protection of the law, singles them out as a class, and destroys their positions and takes away pension rights without due process of law.

III.

A police officer who is summoned before a Grand Jury and who has just reason to suspect, fear, or believe that the public prosecutor is hostile to him, and seeking unjustly to indict and embarrass him, may of right decide for himself whether or not he will exercise his constitutional privilege, and refuse to waive immunity without violation of any duty of his office.

In its findings and decision the Civil Service Commission weighs the duty of a police officer which he is required to perform in the interest of public safety, on one hand, as against a refusal to sign for the State's Attorney a waiver of immunity from prosecution on the other, and states the problem in this language:

> "A question arises as to whether the right of police officers to exercise this constitutional privilege is not overshadowed by their duty to aid in the investigation of crime, a duty which they are specifically employed to perform in the interest of public safety." (Drury Abst. 37).

We suggest that in so stating the legal proposition, or philosophical contemplation, the Civil Service Commission omits to state existing qualifying facts. It assumes that the Grand Jury was at the time investigating the crime of the murder of James Ragen, whereas the fact was that

the State's Attorney had mentally abandoned the prosecution of the alleged assasins of Ragen and commenced prosecution of officers Drury and Connelly who had broken the Ragen murder case wide open.

The Civil Service Commissioners did not note nor consider that the State's Attorney in a surprise move, and with obvious design had caused Captain Connelly and Lieutenant Drury to be brought before the Grand Jury forthwith to testify in a proceeding which he had instituted to indict the officers themselves,—an openly hostile act. That it was a hostile act was later evidenced by the assignment of one of his able prosecutors to follow through with the prosecution of these proceedings in an effort to have officers Drury and Connelly discharged from the Chicago police force,—not his force nor any one working for him.

Nor did the Commission note that obviously Police Commissioner Prendergast was cooperating with State's Attorney Tuohy instead of protecting his officers and that he angrily told the Grand Jury that he would order the officers to testify and later told the Grand Jury that he had suspended the officers to take effect immediately (Drury Abstract 188).

It was when the two officers had learned of the motives and intentions of the State's Attorney to indict them regardless of their innocence and of the attitude of the Commissioner of Police, that they refused to sign the waiver of immunity for the State's Attorney.

That condition of the record was not considered by either the Civil Service Commission or the Appellate Court. The Civil Service Commission noticed the element of good faith but said that it was beside the point, immaterial. Good faith and innocence of the charge made by the State's Attorney was conceded by the Civil Service Commission.

The Appellate Court did not mention it. If such good faith and innocence is an excusing fact the decision of the Civil Service Commission and the judgment of the Appellate Court must fall.

The Civil Service Commission admits the right of police officers to protection under the constitutional prohibition,

> "No person shall be compelled in any criminal case to give evidence against himself"

and say

> "Under our law the constitutional privilege of individuals (including police officers) when acting in good faith, (a) refuse to testify on the ground that their testimony might incriminate them, or (b) to claim immunity from criminal prosecution as to matters concerning which they are compelled to testify, does not admit of doubt." (Drury Abst. 37.)

However in application of the undeniable facts to that principle the Civil Service Commission held:

> "It may be urged that his (each officer) refusal to waive his constitutional privilege was in good faith but this in our view is beside the point." (Drury Abst. 55.)

The Civil Service Commission then ruled that

> "The question is not whether the respondent exercised a constitutional privilege * * * in good faith but rather whether the exercise of that privilege at all is a violation of his duties as a police officer." (Drury Abst. 43, 55.)

Good faith is tacitly conceded by the Civil Service Commission but it says, in effect, "What of it, good faith means means nothing."

But good faith plus official hostility is a complete defense to the charge of unbecoming conduct, as the doctrine advanced by the Commission denies the right to an op-

pressed and persecuted officer to fight back at a tyranical prosecutor; the denial of such right is not fair play, nor is it law.

The Appellate Court in the course of a long opinion does not discuss the subject of good faith at all, but holds that nothing excuses a policeman from testifying even though he may know his downfall is plotted by a hostile prosecutor to bolster a sagging reputation.

There is no question on this record but that the purpose of the proceedings before the Grand Jury on the afternoon of April 2, 1947 was to accomplish the indictment of officers Drury and Connelly and that the State's Attorney and his assistants were openly hostile to officers Drury and Connelly and that both officers feared and believed they were about to be unjustly indicted. The commission so found (Drury Abst. 49).

Under those circumstances the legal picture changes, the instinct of self preservation asserts itself, and no blame can attach to a refusal to enter a State's Attorney's web of intrigue and sign an immunity waiver in furtherance of his designs. The officers' duty to aid in the investigation of crime then becomes abstract and their personal safety concrete, just the same as the lawyer, the judge, and layman.

That the State's Attorney was hostile, and that the officers were innocent of the crime charged against them before the Grand Jury, stand out in bold relief upon the record.

The Grand Jury had voted a no bill upon the evidence when not under pressure of the State's Attorney but again considered and voted a true bill of conspiracy, after State's Attorney Tuohy personally appeared before them and gave them some advice and some new thoughts.

Vainly the defendants sought a trial of those charges upon the indictment at each succeeding term of the Criminal Court. But the State's Attorney would not try the case and it was finally nollied after four terms. The same charges were preferred here in this proceeding and were tried out by the Commissioners under pressure of an Assistant State's Attorney, yet the officers were found to be innocent of that charge and it was dismissed by the Commissioners.

The hostility of the State's Attorney shows at every turn of events. These officers were not working for or under the State's Attorney but were working under the police commissioner of Chicago, personally, in an effort to clean up unsolved murders. Yet the State's Attorney followed up the refusal of the officers to sign the waiver, and their immediate suspension by the police commissioner at the Grand Jury door, by assigning one of his able assistants to prosecute charges before the Civil Service Commission of Chicago where he had no legal standing, and was recognized by courtesy, in an effort to remove them from the Chicago Poilce force on charges drafted in that full legal phaseology used in the Criminal Court indictments, as if they had come full blown from that source.

In the *Holland* case also the court, recognizing the prosecutor's complex, and some phases of our civilization, said:

> "Judges are not expected to be ignorant of those things which other men, through association and concourse with others in similar walks of life well know. While it is not to be construed as the Opinion of this Court that respondent's fears of an unjust prosecution are well founded and we express no opinion in that regard, yet the facts hereinabove referred to, as well as the common knowledge of those familiar with the processes of the criminal law; that such processes

have at times been used for purposes not founded on the furtherance of justice, must be considered in determining respondents good faith in fearing indictment." (p. 359).

The matters referred to in the quotation above do not have to be proven. They are judicially known.

The guilty went free, the innocent were indicted.

It is to be noted that the alleged assasins were quickly discharged upon motion of the State's Attorney, the perjurers went without day, and their changed testimony was used with which to indict the officers who broke the case.

The irony of it all is that the boast of Guzik that he would have both officers fired, however coincidental, came true, while the alleged assassins and the perjured witnesses went free.

All of which is the result of class legislation and the denial of the equal protection of the laws. To hold that such a basis constitutes cause for discharge and forfeiture of pension rights is itself so far from common justice that it cannot be said to be due process of law.

IV.

Unless the circumstances are such as to require, in honesty and good conscience, that a right or privilege be waived, the possessor of such right be he judge, lawyer or layman is neither legally or morally guilty of a wrong in claiming that right. (From Syllabus, In re Holland, 377 Ill. 346.)

The above is taken from Syllabus No. 2 of *In re Holland*, 377 Ill. 346. It reduces to a principle the purport of that case, and we believe it has application to the case at bar, and petitioners here say that the principle which it an-

nounces, when applied to the circumstances of this case, is decisive of the correctness of the Superior Court judgment and error of the judgments of the Civil Service Commission and the Appellate Court.

Judge Sbarbaro, in deciding this case in the Superior Court, relied upon the *Holland* case and quoted therefrom the following said about a lawyer:

> "Complainants say they are not contesting the right of the respondent to claim his privilege but they say that his duty to refuse to do so is of sufficient importance to require that he be disciplined if he claims the privilege. We are unable to follow the argument of counsel that this would not result in a limitation such as was condemned in *In re Opinion of Justices* referred to (300 Mass. 620, 15 N. E. (2d) 662). To say that one has an absolute right to a privilege, but if he exercises it he will be punished, is to limit his enjoyment of that right, and unless the circumstances surrounding him or duties placed upon him are of such character to require, in honesty and good conscience, that he waive the right, we are unable to see wherein it can be said that an individual, be he judge, lawyer or layman is either legally or morally guilty of a wrong should he claim the right." (Drury Abst. 129).

Judge Sbarbaro noted there was no law, ordinance, rule or regulation requiring a police officer to waive immunity; that the officers had never refused to give evidence of any crimes within their knowledge; that they had testified fully, voluntarily, without reservation before the Civil Service Commission; that they had testified voluntarily before the March Grand Jury on March 17, 1947 and no immunity waiver was then asked of them; and on the charges made in the indictment the Civil Service Commission had found them not guilty; that the indictment against petitioners was

nollied after repeated demands for trial; and drew the conclusion that under all the circumstances of obvious innocence no stigma could attach to the officers for refusal to sign an immunity waiver and that to agree with the Civil Service Commission was to accord the constitutional privilege to the guilty and deny it to the innocent; and we say it furnishes an example of the denial of equal protection of the law.

Petitioners here rely upon the *Holland* case because it establishes the principle that where autocratic power is employed to indict innocent persons they may in good faith refuse to sign immunity waivers or to answer personal questions; and they cannot be questioned elsewhere for relying on the constitutional exemption nor punished for having done so, and the particular profession or employment they may be in can make no difference in principle.

As we believe the *Holland* case announces principles which when applied are conclusive of the merits of this case we will now consider it in its application.

The Appellate Court in its opinion refers to *In re Holland*, 377 Ill. 346 as an authority for its holding that a policeman cannot have the benefit of the constitutional prohibition against a prosecutor compelling him to testify where his indictment is sought. We respectfully suggest that the *Holland* case is susceptible of no such construction.

The *Holland* case is based upon fundamental principles applicable alike to "judge, lawyer or laymlan" as that opinion phrases it.

And the Court there holds that to treat the rule as absolute, where the right is not waived, that the witness is guily of contumacious conduct "is to measure him with an idealism which itself may ofttimes result in injustice a result neither legally nor morally justified" (p. 353).

In the *Holland* case it appeared that Judge Holland of the Municipal Court of Chicago was called before the Grand Jury to testify in an investigation of the gangster murder of one O'Hare with whom Judge Holland had had some business transactions. It was being proclaimed in the news that O'Hare was a gangster front. Judge Holland refused to sign an immunity waiver before testifying but was nevertheless examined by the State's Attorney before the Grand Jury. He answered all questions concerning the murder of O'Hare but refused, under claim of his constitutional rights, to answer as to his business dealings with O'Hare. In resulting contempt proceedings before the Chief Justice of the Criminal Court of Cook County, the rule was discharged on the ground that the constitution exempted him from being a witness against himself and self-incrimination.

The Chicago Bar Association, not satisfied with that judgment, then commenced a proceeding to have the Supreme Court of Illinois discipline Judge Holland, claiming that duty, as a lawyer, rested upon him to aid in the investigation of the O'Hare crime and that because of his claim of privilege he was lacking in good faith and should be disciplined. The court there stated the contention of the amicus curiae in these words:

> "As we understand the position of amicus curiae, it is that a lawyer, though possessing this privilege accorded by the constitution has nevertheless an overshadowing duty as a lawyer to refuse to exercise it in a case such as this, and that his failure to so refuse renders him subject to discipline." (p. 352)

As to that contention the court recognizes that the constitutional right is usually held to be absolute by the one possessing it but says:

"Many human rights are surrounded by equally

> just principles out of which such claimed right can scarecely be said to have arisen, and upon which it may not be based, and those principles may so outweigh the right claimed as to prevent insistence upon it. But to make the general charge that the claimant of such a right is guilty of contumacious conduct if he does not recognize as controlling those surrounding principles and forsake his right, is to measure him by an idealism which itself may oftimes result in injustice, a result neither legally nor morally justified. * * * The right given by the constitution being legal, is, as well a moral right, since the public point of view can scarcely be said to include that which is not moral." (p. 352-353).

Judge Holland had heard that the State's Attorney wanted to see him about the O'Hara crime and he had gone voluntarily to the State's Attorney's office and was examined before a stenographer. It appeared that he and the State's Attorney belonged to hostile factions of the same party and Judge Holland hoped his frankness would smooth over political animosities of other days, but, on the following day head lines appeared in the papers stemming from interviews given out by the State's Attorney affecting him caused Judge Holland to become impressed with the thought that the State's Attorney was about to investigate him instead of the O'Hare murder. Based upon that fear he refused to sign an immunity waiver. The State's Attorney examined him before the Grand Jury anyhow and Judge Holland answered all questions as to O'Hare's death but refused to answer, on Constitutional grounds, questions concerning his personal matters with O'Hare. Judge Holland was then cited for contempt but the Chief Justice of the Criminal Court discharged the rule.

The Chicago Bar Association then instituted the proceedings to disclipline Judge Holland which is the *Holland* case in 377 Ill. 346.

The court, in he *Holland* case, quoed from *People* v. *Forbes*, 143 N. Y. 219, 38 N. E. 303, where a relator had been found guilty of contempt for refusing to testify before a grand jury, while insisting upon his innocence. The reasoning of the New York Court in upholding the privilege of an innocent person in his effort of self-protection, is quoted as follows:

> "The testimony of the witness might be ever so strong and clear in favor of his innocence, but it did not conclude the public prosecutor, in the absence of some constitutional or statutory provision securing the relator from prosecution. The general statements of a person charged with crime in regard to his innocence avail but little against incriminating facts and circumstances. His protestations of innocence, and his broad general denial of any knowledge of or connection with the transaction, might be overcome by facts and circumstances, if the District Attorney could be permitted to draw them from the witness. Any one who has had much experience in the conduct of criminal trials is aware of the fact that frequently the most dangerous proof that a person charged with crime has to meet are his own statements made for the purpose of warding off suspicion or satisfying others with regard to his innocence. It is not unusual on such trials to confront the accused with his own declarations made for the very purpose of exonerating himself from all suspicion, but which, when all the evidence is collected, are so far at war with all the facts and circumstances as to furnish guilt." (p. 354-355).

The late Justice Stone who wrote the opinion in the *Holland* case added his own comments in these words:

> "This is a succinct statement of an important reason for the constitutional safeguard. Without such safeguard any person, judge, lawyer or layman, may be forced to answer questions upon the mere suspicion of the public prosecutor, or in furtherance of a misuse

> of his discretion for political or other improper purposes; or he may be subjected to blackmail through threats of the unscrupulous to procure his prosecution." (P. 355.)

The *Holland* case opinion then quoted from *People* v. *Spain*, 307 Ill. 383, the following as the principle to be followed:

> "When a proper case arises, the constitutional provisions quoted should be applied in a broad and liberal spirit in order to secure to the citizen that immunity from every species of self-accusation implied in the brief, but comprehensive language in which they are expressed." (P. 357.)

The court then pointed out that there was no evidence in the record of any judicial or personal act on Judge Hollands part showing moral turpitude, and further commented:

> "Judges are not expected to be ignorant of those things which other men through association and concourse with others in similar walks of life, well know. While it is not to be construed as the opinion of this court that respondent's fears of an unjust prosecution are well founded, and we express no opinion in that regard, yet the facts hereinbefore referred to, as well as the common knowledge of those familiar with the processes of the criminal law, that such processes have at times been used for purposes not founded on the furtherance of justice, must be considered in determining respondent's good faith in fearing indictment." (P. 359.)

By what the court there said it will be seen that the conduct and motives of a prosecuting attorney are to be recognized as an excusing element in deciding such a question, without necessarily adjudicating the existence of such motives. The possibility of their existence is the controlling thought.

In he *Holland* case Judge Holland's fears of indictment were caused by acts of the State's Attorney. Here there is no doubt about what State's Attorney Tuohy was planning to do and that he was carrying out those plans. He was no longer functioning as the State's Attorney investigating the Ragen murder, he was in effect personally seeking to indict Drury and Connelly and had already presented evidence of the perjured witnesses against them to the Grand Jury. His plans were kept from Drury and Connelly, and his purpose was to surprise them and to have them give testimony against themselves upon which he could secure an indictment and upon which he could convict them. His obvious purpose was to compel them to testify against themselves, to be destroyed if they did, or be destroyed if they did not. In either event he would destroy them.

The law under such circumstances will not require a policeman or any other person similarly situated to waive immunity under penalty of such destruction.

Equal protection of the law was denied.

While a policeman like a lawyer and judge must act in good faith, the law,—the prosecuting officials themselves, who are in effect the law,—likewise must exercise good faith toward the accused. Good faith is not all on one side.

We are contending that a police officer is protected in his consttiutional rights by the same principal announced in the *Holland* case. Mr. Justice Stone in formulating his opinion in that case was not writing for lawyers and judges alone, he was laying down a principle as a basis for his decision, which was then made the decision of the court.

He said twice in the Opinion that it applied alike to "lawyer, judge or layman" (P. 355, 357). And there the Court said that when the witness acted in good faith he could not be disciplined. While that holding was made in a lawyer's case, yet if it be a principle it must apply to all persons, in similar circumstances, who find themselves brought before a Grand Jury with the very purpose of the prosecutor to have them testify against themselves, and to allow the privilege to one and deny it to the other violates the provision of the Fourteenth Amendment prohibiting states from denying equal protection of the laws.

This record admits the innocence of Drury and Connelly. The State's Attorney would not try them after the Grand Jury had indicted them, and the Commission after hearing all the testimony concerning the Grand Jury charge held them to be innocent of the charges so made. The remaining charge was simply that they did not sign a jury waiver when asked.

The defense was innocence and good faith. Petitioners proved themselves innocent and where the State's Attorney was seeking to indict them, though innocent, the rule announced in the *Holland* case is equally applicable to a policeman as to a lawyer, and to deny the operation of that rule was to deny equal protection of the laws.

V.

There is no legitimate basis for the blanket ruling of the Appellate Court that no policeman can refuse to sign an immunity waiver, no matter what the circumstances may be, and the rule here sought to be enforced applies to all public officials and should not be made for policemen alone, as such application is discriminatory and denies equal protection of the law.

The question presented here is a comparatively recent development in legal history. It is an exception grafted upon the constitutional doctrine that no one shall be compelled to be a witness against himself.

The new thought is that a policeman shall not shield himself with constitutional protection when called before a grand jury or court to testify, and if he does, he is to be removed from office. It has been advanced in several cases and some states have constitutional provisions covering the subject; some states have laws; some cities charters, and some boards departmental rules to the effect officials must testify when called.

In 1907 *Scholl* v. *Bell,* 125 Ky. 750, 102 S. W. 248, was decided. It involved some policeman who guarded polling places where fraudulent practices were indulged but who claimed constitutional immunity in resulting litigation against the election officials. The Court gave vent to some vitrolic dicta which has since been quoted as if a necessary adjudication.

In 1931 *Sander* v. *City of Philadelphia,* 305 Pa. 1 156 Atl. 245 arose which involved a captain of police who had become wealthy on a comparatively small salary. When brought before the Grand Jury he gave no satisfactory ex-

planation and when charges were brought against him for unbecoming conduct he made no defense when a transcript of his own evidence was introduced. His discharge was affirmed.

In 1939 *Christel* v. *Police Com. of San Francisco,* 33 Cal. App. (2d) 564, 92 pac. (2d) 416, was decided in a case involving an investigation of the San Francisco police department. The officer had refused to testify before the Grand Jury claiming his constitutional privilege. He was discharged under a departmental rule that required testimony without reservation before a grand jury, and over the claim that the rule was invalid.

In 1940 *Cateline* v. *McClellan,* 282 N. Y. 166, 25 N. E. (2d) 972 was decided wherein there was in question conduct of policemen prior to the effective date of a new constitution which provided for discharge of public officials who should refuse to sign immunity waivers. It was held that the constitutional provision was retrospevtive.

In 1942 in *Goldway* v. *Board of Higher Education,* 37 N. Y. S. (2d) 34 a high school teacher refused to sign an immunity waiver when summoned to appear before a Joint Inquisition Committee. She was not sworn and was discharged under a provision of the New York Charter which so provided.

In 1940 in *In re Grae,* 282 N. Y. 428, 26 N. E. 2d 963 the New York Court of Appeals excused a lawyer who had been suspended because he had refused to sign an immunity waiver in an inquiry ordered by a court into certain unlawful and unethical practices. The lawyer witness said he had no fear of what had been his own conduct but he feared because of his long experience an unfriendly attitude toward him might produce criminal charges if he tes-

tified. The Court of Appeals there held that under such circumstances the lawyer should have the privilege of deciding for himself whether his testimony might tend to incriminate him.

In 1941 the *In re Holland,* 377 Ill. 346 case was decided in Illinois, which involved Judge Holland of the Municipal Court of Chicago. When summoned to testify in the grand jury investigation of the gangster murder of one O'Hare with whom Judge Holland had had some business dealings, he became convinced that the States Attorney was investigating him instead of the murder of O'Hare and claimed immunity accordingly. He was cited for contempt before the Chief Justice of the Criminal Court and the rule was discharged upon hearing. The Chicago Bar Association then filed a proceeding to discipline Judge Holland as a lawyer and that is the *Holland* case referred to herein. The Supreme Court of Illinois, after examining all of the authorities, announced a principle that when such a witness was summoned by a hostile prosecuting attorney pursuing him to destruction he had a right to consult his own safety and decline to put himself in the power of such an adversary.

In the *Kentucky* case the court made some remarks maybe appropriate but angered dicta.

In the *Pennsylvania* case the policeman would not testify before the Civil Service board and deny incriminating facts. He had testified before the grand jury but would not before the Board that tried him, when his statements before the Grand Jury were introduced against him.

In the *California* case there was a departmental rule.

In New York there was a New York City Charter and a New York Constitution and a rule of court to justify proceedings.

In Illinois there is no legislation, ordinance, rule or law to justify this proceeding. Decision must be made upon a principle.

The late Justice Cardoza rendered the majority opinion of the Court in the matter of *William Boyle,* 257 N. Y. 244, in deciding that Boyle, a New York Attorney, was justified in exercising his constitutional right in refusing to testify before a legislative committee investigating the conduct of various departments of the City of New York.

Amongst other things, Judge Cardoza ruled that the majority of the Court maintained that the constitutional privilege against self-incrimination may not be violated because in a particular case its restraints are inconvenient, or because the supposed malefactor may be the subject of public execration, or because the disclosure of his wrong-doing will promote the public weal. The constitutional privilege against self-incrimination is a barrier interposed between the individual and the power of the Government, a barrier interposed by the sovereign people of the state. Neither legislators nor judges are free to overleap it.

At page 265, the Court said:

> "The witness is within his privilege in insisting that the basis for his immunity shall be something more substantial than the grace or favor of the prosecutor who may bring him to the bar of justice . . . To uphold a finding that his conduct amounted to a contempt it must appear that in refusing to answer he was violating a legal, and not merely a moral obligation. The immunity like the obligation must have its source and sanction in the law."

Again at page 268, the Court said:

> "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feel-

ings and distorts the judgments' . . . are not to change their form and content in response to the 'hydraulic pressure' . . . exerted by great causes. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms."

The exemption from self-incrimination is still a treasured privilege.

Wigmore says, in his discussion of the rule against self incrimination, that it "exists for the sake of the innocent, or for reasons irrespective of the guilt of the accused ***. For the sake then not of the guilty; but of the innocent accused, and of conservative and healthy principle of judicial conduct, the privilege should be preserved." (Wigmore Vol. VIII, p. 309, Sec. 2251).

An American Bar Committee of 5, three of whom were judges with an advisory committee of 65, one from each state, and territory, and 15 at large reported (1937-8) against abolution of the constitutional privilege and said:

> "We do however think it fit to mention one of the reasons that count against such a proposal, viz: the vehement and sometimes unscrupulous conduct of prosecutions by district attorneys in many communities. Usually young and zealous, moved largely by the desire to make a high record of convictions and thus confirm and assure the electoral choice of their constituents, they conduct the prosecution in a manner which reminds one rather of the traditional methods of the old regime in the continental countries of Europe rather than of a democracy of liberty and fair trials. So until a decided change for the better is observable in the communities where such an attitude

prevails, it is hardly worth while to consider removing the constitutional protection given to an accused by the privilege. We therefore do not recommend its abolition" (Wigmore Vol. VIII p. 316-317 Sec. 2251).

The flat holding of the Civil Service Commission and the Appellate Court that no policeman can avail himself of the constitutional provisions prohibiting a person being compelled to testify against himself is a flat denial of any right to the protection of those provisions under any circumstances regardless of good faith on the part of the officer and bad faith and tyranny on the party of the public prosecutor. No case in the books has gone so far.

The Courts of New York and Illinois have allowed a lawyer in good faith to have advantage of those provision of the constitutions as against a hostile prosecutor. No reason that can be imagined exists why any witness or official so circumstanced may not, on principle, have the same consideration.

To deny the common right is to deny the common or equal protection of the law.

We therefore suggest that the decision of the Appellate Court of Illinois is an unsound and dangerous precedent and should not be allowed to stand unchallenged in judicial literature, and that the holdings in the *Hollad* case and *In re Grae* should be approved, and followed.

To allow the rule as laid down by the Appellate Court to stand operates to deny to officers Drury and Connelly advantage of those constitutional prohibitions as well as to deny due process and equal protection of the laws; and abridges the privileges and immunities as guaranteed by the Fifth and the Fourteenth Amendments to the Federal Constitution.

Respectfully submitted

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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 780 and 781

WILLIAM J. DRURY,

Petitioner,

vs.

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and

THOMAS E. CONNELLY,

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REPLY BRIEF OF PETITIONERS (on Petition for Certiorari).

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May it Please the Court:

We reply to the points made by respondents in the order in which they appear in their Brief in Opposition:

I.

A "construction of the constitution" must be involved in a case in order to support a direct appeal to the Supreme Court of Illinois. All other constitutional questions go to the Appellate Court.

Opposing counsel have argued that the Supreme Court of Illinois decided that there was no constitutional questions upon this record, but such contention is untenable for the reason that the Supreme Court has only a limited jurisdiction of constitutional questions on direct appeal,—where a "construction of the constitution" is involved, only.

This cause was transferred by the Supreme Court of Illinois to the Appellate Court of that State,—not because there was no constitutional question on the record—but because, as said by the Supreme Court of Illinois, the particular constitutional question raised was not one in which a "*construction of the constitution* is involved" as provided in the Civil Practice Act of Illinois.

Viewpoint on direct appeals reversed.

The decision is a tacit reversal of the viewpoint, formerly entertained that all constitutional questions went directly to the Supreme Court on appeal, and that the Appellate Court had no jurisdiction to consider any constitutional question.

As pointed out in the opinion of the Illinois Supreme Court its jurisdiction on direct appeal depends upon whether there is in the record a "*fairly debatable constitutional question of the character mentioned in the Civil Practice Act*" preserved in the record.

These cases were therefore transferred to the Appellate Court of Illinois to consider the constitutional questions, as well as others, upon the record. But the Appellate Court ignored the constitutional questions raised and argued, so got no decision on their constitutional questions.

Construction presumes ambiguity or uncertainty.

Cases have arisen in other jurisdictions where the phrase "construction of the constitution" is used to designate where an appeal should be taken whether to an Appellate or Supreme Court and it is held that the phrase in its context imparts some ambiguity or uncertainty as to meaning; and so it was held that "when the language is plain there can be no construction, because there is nothing to construe" (*Terre Haute R. Co.* v. *Erdel,* 158 Ind. 344; *Turner* v. *State,* 185 Ga. 432). Negative and prohibitive clauses of the Fourteenth Amendment need no construction (16 C. J. S., p. 103, Sec. 50). "Where the intention is clear there is no reason for construction" of constitutional provisions (*U. S.* v. *Sprague,* 282 U. S. 716.)

The Supreme Court of Illinois has finally in its opinion in these cases, put itself right on its jurisdiction in direct appeals in constitutional questions. It points out that it has no jurisdiction on direct appeal *unless there is involved a construction of the constitution,*—a fairly debatable construction, as contemplated in the Civil Practice Act of Illinois. Heretofore it has been considered that all appeals in constitutional cases go direct to the Supreme Court, and the Appellate Court has always refused to consider any type of constitutional question and has consistently held all consitutional question as waived by appeal to the Appellate Court. For instance in the case of *People* v. *White,* 329 Ill. App. 81 that Court said:

> "Since neither of these appeals was prosecuted to the Supreme Court, *which has exclusive jurisdiction to determine constitution questions* * * *," (Italics ours.)

So there being *no construction* of the constitution sought, —but only its *applicability and enforcement,* the Supreme Court of Illinois had only jurisdiction to order the cases transferred to the Appellate Court under the applicable statute providing for transfer of cases erroneously appealed.

The Appellate Court takes all constitutional cases except cases involving construction.

So the statement should now be phrased differently, and be made to state, that appeals involving all constitutional questions go to the Appellate Court of Illinois, except those involving a fairly debatable issue of *"construction of the consttiution"*.

Opposing counsel say the "Appellate Court did not consider any constitutional question," (p. 15), which means that the Appellate Court did not pass upon the constitutional questions on the record because it either ignored those questions, or, it erroneously conceived it had no jurisdiction to pass upon any constitutional question. If the latter its error in that regard is now exposed under the decision of the Illinois Supreme Court in this case.

If the Appellate Court ignored the constitutional questions it left the decision thereof for this court.

The patent fact is, whether or not considered by the Illinois Courts, the constitutional questions presented here were argued at every turn of the case,—before the Civil Service Commission, before the Supreme Court of Illinois, the llinois Appellate Court, again on petition for leave to apepal, and now, here. They have never been soft pedaled, abandoned, nor waived.

In any event the federal questions raised should have been passed upon, and the failure to do so denied due process of law.

II.

The judgment of the Supreme Court of Illinois transferring the two appeals to the Appellate Court for decision was obviously interlocutory.

Opposing counsel contend that *all* constitutional questions were waived by petitioners because they did not ask for certiorari here from the judgment of the Supreme

Court of Illinois transferring the cases to the Appellate Court of Illinois, but we point out that there are three answers to that contention—(A) the order was interlocutory; (B) the type of the constitutional questions raised were not such as allow direct appeal to the Supreme Court; (C) the ultimate decision of such question is for this court, which we discuss in order.

A.

An order transferring a cause to another court for decision because of a procedural error, and lack of jurisdiction, obviously is not final,—no more than a change of venue would be. Where the court has no jurisdiction it can only order the cause tranferred.

B.

The Supreme Court of Illinois pointed out in its opinion that no construction of a constitutional prvision was made by the trial court, and none were raised on the record, and that that was the only type of constitutional question that would support a direct appeal to the Supereme Court of Illinois.

C.

This Court is not bound by decisions of state courts as to whether a federal constitutional question is raised by the record nor by the disposition made of such contentions in the State courts. Federal questions are tried as of course in State courts, and records made, the same as upon other issues, but this court ultimately judges whether such federal questions are correctly disposed of, procedurally or substantively.

We respecfully suggest that where, by procedural movements a constitutional question is sidetracked, and not passed upon, a party relying upon such constitutional question is effectively denied a hearing and thereby denied due process of law.

III.

The standard of conduct of a police official is not so high, or duties so exacting, that he may not defend himself against official tyranny.

Opposing counsel say that it was properly held that the refusal of petitioners to sign an immunity waiver before the Grand Jury "concerning matters arising out of and during the course of their employment was cause for their removal." The statement, by its assumptions, is incorrect. The matters did not arise out of and during the course of their employment in the sense contended. The matters referred to reflect a staged proceeding by a hostile State's Attorney and his effort to crush and destroy petitioners as police officers by a Grand Jury hearing and an indictment, —sought obviously as a basis for the discharge of petitioners upon a manufactured "cause".

Opposing counsel do not mention in their argument, nor seek to excuse, the admittedly tyranous conduct of the State's Attorney toward petitioners as an element of the case; whereas we contend that it makes the exception to the rule, if there be a correlative rule.

The viewpoint of respondents is stated in their Brief in Opposition at page 24 thereof as follows:

> "We do not question that the petitioners have the constitutional right to refuse to sign an immunity waiver. We contend that in refusing to do so, under the circumstances of this case, [they do not states the circumstances], they acted in violation of their duties, failed to measure up to the high standards of character and moral conduct incumbent upon trusted police officers and were therefore guilty of conduct unbecoming police officers and subject to removal under Section 12 of the City Civil Service Act."

The standard set for conduct under such circumstances as here shown is too high for any calling. Self preservation is the law naturally obeyed. Petitioners were not supposed in law to turn the other cheek nor put themselves in position to be kicked.

Oposing counsel do not mention the staging of the Grand Jury hearing by the aggresively hostile State's Attorney, and the admitted innocence of petitioners as circumstances; nor the personal activity of the State's Attorney in taking a nolle prosse of the indictment against the alleged assassins; his subsequent apearance before the Grand Jury on the same day after it had voted a "no bill" as to his charges against petitioners; the resulting indictment of petitioners upon the perjured testimony of the recanting witnesses, and the personal interest taken in the prosecution of petitioners before the Civil Service Board.

We include those elements in our question and ask whether under those circumstances a refusal by petitioners to sign an immunity waiver is unbecoming conduct.

We challenge the view point that a refusal to sign an immunity waiver for a State's Attorney, who is making the matter a personal isue, could be made a cause for discharge from a Civil Service position, even if there were a law, or rule, establishing such refusal as a cause; and suggest that, even supposing such a rule to exist, the circumstances here, admittedly existing, would be an excusing exception.

Petitioners were called to testify against themselves.

Petitioners were brought before the Grand Jury to testify against themselves,—not against any one else; and they were asked to sign immunity waivers so that what they might say could be used against them elsewhere.

The situation was no different in principle than if they had been indicted, and, on trial, the State's Attorney had called them to the stand to testify for the State as witnesses against themselves

No one, we asume, would contend that it would be conduct unbecoming a police officer to refuse to be a witness against himself if he were called by the State's Attorney to testify as a witness for the State in a prosecution under an indictment against himself;—for he is not then in character; neither is he in character when he resists a public prosecutor who is personally staging an effort to destroy him by a pretrial examination, and the process of indictment. It is then his personal, not his official concern. There can be no difference in principle, for the State's Attorney here was seeking statements to use against petitioners as original testimony in a trial under an anticipated indictment. If he was not, then he was trying to publicly disgrace them and secure their discharge. On either theory petitioners, were justified in seeking their own preservation.

IV.

Delegation to the Civil Service Commission of the power to determine what shall be cause for dismissal, only delegates power to make a rule fixing what shall be cause. Fixing a cause by order or judgment on complaint is legislation, and in this instance its legislation is by class and denies equal protection of the law.

We do not contend, as opposing counsel suggests, that the judgments of the Appellate and Supreme Court of Illinois is the source of the class legislation complained of; what we say is that where the Civil Service Commission does not by rule, which is legislation, establish what is cause for discharge, it is, by its judgments legislating from day to day, and case to case, certain conduct to be cause for discharge; because such judgments may not be the same one day as the next; which is progressively legislating to suit the occasion and doing so ex post facto. It is legislating without a standard to go by.

The legislature of Illinois has delegated to the City Civil Service Commission the power to determine "cause" for

discharge of an employe by the restrictive phrase that no officer or employee should "be removed or discharged except for cause." Necessarily the Commission legislates every time it discharges some one for some conduct not specified as cause in the law or rules. By its order it makes the law of the case. Its orders are legislative in nature.

Ex Post Facto Judgments.

Law was enacted by the Civil Service Commission by its judgments in this case,—made after the fact. Its legislation should have been made by rule before the fact,—before service in the position was commenced; or, at least, before the fact complained of,—for the right of immunity from being a witness against oneself is a privilege and a right; legal and necessarily moral. It should have been proclaimed by rule, if it were to be urged that waiver of the constitutional privilege was inherent in the obligations of a police officer.

Power to legislate usurped by the Civil Service Commission.

In any case the claim of constitutional immunity from being made a witness against oneself becomes a natural and inherent right under our basic law, and if the exercise of such right is to be made a "cause" for discharge of a policeman from a Civil Service position, the legislation to that effect should be first made so that assumption of the office waives the right in advance. Which illustrates the contention that making a claim of immunity from being made a witness against oneself, as a "cause" for removal of a policeman, is essentially legislative in character.

The legislature has fixed no standard.

The establishment of such a doctrine belongs to the legislature and not to the Civil Service Commission. By such orders the Civil Service Commission usurps the functions

of the legislature. No such law exists in Illinois and the Civil Service Commission has no power to make such law,—it only usurps such power.

We respectfully suggest that the obvious malice in which this case originated and the usurpation of legislative power by the Civil Service Commission; the refusal of the Illinois courts of appeal to consider constitutional questions upon the record; the effect of such procedure and decisions upon the fortunes of petitioners, and of others similarly situated, is such that it violates the spirit of the Fourteenth Amendment and denies to petitioners equal protection of the laws and due process of law.

Due process is more than a slogan, it is fair play.

Of what possible good to a defendant is a law suit if the court refuses to hear his contentions. The physical characteristics of a law suit may be there as when the characters are going through the pantomine but the spirit of due process is missing and the substance of due process is denied.

Due Process is denied when constitutional rights are ignored and federal questions are officiously brushed aside by State tribunals.

The principle of the cited cases have been argued.

The cases cited by opposing counsel are of course interesting and educational but they do not decide the point at issue in this case and we refrain from otherwise commenting upon them here as our original brief contains an applicable discussion.

The question persists.

The question remains whether *under any circumstances* a policeman may claim the constitutional exemption from being a witness against himself. The Appellate Court of Illinois says there is none; while the Supreme Court of Illinois and the Court of Appeals of New York say a lawyer similarly situated may claim the privilege without showing any moral unfitness. Both, we assert, and all, should be equally protected, as the Fourteenth Amendment guarantees.

Conclusion.

Wherefore it is respectfully suggested that the arguments here made and authorities cited show that an important and unsettled question of law is upon this record and that the Court should take the case on certiorari for decision.

Respectfully submitted,

Luis Kutner,
Counsel for Petitioners.

Ode L. Rankin,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 780 and 781.

WILLIAM J. DRURY,

Petitioner,

vs.

STEPHEN E. HURLEY, JOHN W. CLARK and ALBERT E. WILLIAMS, Civil Service Commissions of the City of Chicago,

Respondents,

and

THOMAS E. CONNELLY,

Petitioner,

vs.

STEPHEN E. HURLEY, JOHN W. CLARK and ALBERT E. WILLIAMS, Civil Service Commissioners of the City of Chicago,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondents Stephen E. Hurley, John W. Clark and Albert E. Williams, Civil Service Commissioners of the City of Chicago oppose the petition for certiorari on the following grounds:

FOREWORD.

The facts and issues involved in the *William J. Drury* and the *Thomas E. Connelly* cases being identical (*Connelly* v. *Hurley,* 402 Ill. 236, 238; *Drury* v. *Hurley,* 339 Ill. App. 33, 36-37), the respondents will follow the procedure used by the petitioners and file only one brief in opposition to the petition for certiorari.

On May 1, 1950 the attorney for the petitioners served respondents with notice that on April 27, 1950 a Petition for Writ of Certiorari was filed with the Clerk of the Supreme Court of the United States. According to the rules of this court the time for the petitioners to file their Petition for Writ of Certiorari expired on April 12, 1950. Investigation disclosed that the petitioners, without notice to the respondents, appeared before Mr. Justice Sherman Minton on April 5, 1950 and secured an order extending the time within which to file their Petition for Writ of Certiorari to April 27, 1950.

At the time the attorney for the petitioners served the above-mentioned notice he also served a copy of the Abstract of Record filed by petitioner Connelly in the office of the Clerk of the Supreme Court of Illinois in connection with his Petition for Leave to Appeal from the decision of the Appellate Court. He failed to serve a copy of the Transcript of Record as required by Rule 38 of the Supreme Court of the United States. On May 10, 1950 we communicated with the Honorable Charles Elmer Cropley, Clerk of the Supreme Court of the United States, and were informed that the attorney for the petitioners, again without notice, secured an order of this court dispensing with the printing of the complete record as provided by the rules of court.

Under the circumstances it will be impossible for us to refer to pages in the Transcript of the Record in discussing the facts. We will be compelled to use the abstract filed in the Supreme Court of Illinois in the *Drury* case for page references as to the facts we believe pertinent.

STATEMENT OF FACTS.

The petitioners have rearranged and misstated the facts, most of them without abstract references, with the result that the facts, as stated by them, are most confusing and in many respects not sustained by the record. Oddly, the petitioners go far afield from judicial precedent and call this court's attention to matters admittedly not in the record (Petition p. 6), and, at least at one point in their petition (p. 9), call this court's attention to an unauthenticated book published in 1950, approximately three years after the facts which form the basis of this litigation took place. We could answer the remarks made in "Chicago Confidential" by calling this court's attention to numerous editorials which have appeared from time to time in the majority of the Chicago newspapers which laud the action of the Civil Service Commission of the City of Chicago and of the Appellate and Supreme Courts of the State of Illinois in removing the petitioners from their positions in the Police Department of the City of Chicago. However, we believe that ethical practice requires us to limit our discussion to the facts and circumstances appearing in the record and the legal principles applying thereto. The respondents do, however, believe it necessary to state the facts as disclosed by the record and as found by the Appellate Court of Illinois (*Drury* v. *Hurley*, 339 Ill. App. 33)

and the Supreme Court of Illinois (*Drury* v. *Hurley*, 402 Ill. 243).

On April 2, 1947, William J. Drury, a Lieutenant in the Police Department of the City of Chicago, and Thomas E. Connelly, a Captain in the Police Department of the City of Chicago, were suspended by the Commissioner of Police (Abst. 15, 34). Thereafter, on April 24, 1947, the Commissioner filed separate charges with the Civil Service Commission of the City of Chicago against Drury and Connelly, charging them with conduct unbecoming a police officer (1) in refusing to sign an immunity waiver when summoned to appear before the March 1947 Grand Jury of Cook County, Illinois, and (2) in unlawfully conspiring amongst themselves and LeRoy Russell and John White to procure the indictment of Dave Yaris, William Block and Leonard Patrick, for the murder of one James M. Ragen, and in inducing Russell falsely to identify Block as a participant therein (Abst. 28, 29). A lengthy hearing was held by the Civil Service Commission sitting as a Trial Board which, on October 16, 1947, filed its Finding and Decision (Abst. 28-51, 105) holding that there was not sufficient evidence to sustain the charges filed against Drury and Connelly of unlawful conspiracy relating to the procurement of the indictment of Yaris, Block and Patrick for the murder of Ragen or of inducing Russell falsely to identify Block as a participant therein (Abst. 36). The Commission, after a discussion of the rights of a policeman to refuse to sign an immunity waiver when called to testify before a Grand Jury on matters arising out of his employment and his right to retain his position as a policeman after such refusal, held that such refusal was conduct unbecoming a police officer and ordered the discharge of Drury and Connelly from their positions in the

Police Department and from the service of the City of Chicago (Abst. 50, 51).

On October 16, 1947 the Civil Service Commission rendered its written Finding and Decision (Abst. 28-51, 105) finding Drury and Connelly guilty of conduct unbecoming a police officer for their refusal to sign an immunity waiver, when requested so to do, when they appeared before the March 1947 Grand Jury of Cook County, Illinois, and ordering their removal from the Department of Police of the City of Chicago, and as a member of such department and from the service of the City of Chicago (Abst. 50). On October 16, 1947 the Commission certified its Finding and Decision to the Commissioner of Police and directed the Commissioner of Police to put the order of discharge and removal into effect forthwith (Abst. 109). The Commissioner of Police reported to the Civil Service Commission that he did, on October 16, 1947, discharge Drury and Connelly from the Police Department and from the service of the City of Chicago for violation of Rule 389, Section 3—Conduct Unbecoming a Police Officer or an Employe of the Police Department, which report was received by the Civil Service Commission on October 20, 1947, and approved October 21, 1947 (Abst. 112).

The trial court, on January 28, 1948, rendered a written statement of reasons for its decision sustaining the motion of Drury and Connelly to quash the record of proceedings of the Civil Service Commission of the City of Chicago and, ordering the reinstatement of Drury and Connelly, found "that the Civil Service Commission acted very carefully and certainly exercised no prejudice against plaintiffs herein in its conduct of said proceeding. Its Finding and Decision impresses the Court that it gave ample opportunity to the plaintiffs to be heard in their own defense and in its finding and decision reflects what

the record shows, a frank and honest statement of the facts favorable to each of the plaintiffs" (Abst. 120, 121, 131).

The trial court adopted the findings of fact of the Civil Service Commission in its entirety but differed in its conclusion of law, based on said facts. The court held that a police officer cannot be removed from his position on a charge of conduct unbecoming a police officer if he refuses to sign an immunity waiver when called upon to testify before the Grand Jury as to matters arising out of and within the scope of his employment (Abst. 131-132).

The Appellate Court (*Drury* v. *Hurley,* 339 Ill. App. 33) made the following findings of fact (pp. 35-37):

> "William J. Drury and Thomas E. Connelly filed separate petitions for writs of certiorari to review the action of the Civil Service Commission of the City of Chicago which had ordered them discharged from their positions as lieutenant and captain of police, respectively, in the classified service of the Department of Police in the City of Chicago, because of their refusal to execute in writing immunity waivers when summoned and prior to testifying before the March 1947, grand jury concerning matters arising out of their investigation of the shooting of one James M. Ragen. In September 1946, the two officers had been assigned by the Commissioner of Police to investigate some 80 unsolved murders, including the shooting on June 24, 1946, of Ragen, which resulted in his death some time afterward. In due course they interviewed three witnesses from whom they obtained signed statements that they could identify the occupants of the moving truck from which Ragen had been shot. Partly on the strength of their testimony and that of the two petitioners, who also testified before the grand jury on March 17, 1947, without claiming immunity, three men were indicted for the murder. Later, two of the witnesses recanted their testimony and when again called before the grand jury on April 2, 1947, stated that they could identify no one implicated in the Ragen

shooting. Petitioners were forthwith summoned and each in turn appeared before the grand jury. As matters developed they had reason to believe that they were suspected of having conspired to obtain an unfounded indictment of the Ragen murder suspect, through subornation of perjury, bribery and threats, and that their testimony might be sought in an inquiry as to their own conduct in an investigation of that crime. Accordingly, when asked to sign immunity waivers, they refused to do so, and were excused without questioning. They were thereupon promptly suspended by the Commissioner of Police who subsequently filed with the Civil Service Commission charges that they were guilty of conduct unbecoming an officer (1) in refusing to waive immunity, and (2) in unlawfully conspiring among themselves and others to procure an indictment of three persons for the murder of Ragen. Because of the similarity of the charges and by stipulation of counsel, the cases against both police officers were jointly heard by the Civil Service Commission which found that the evidence before it was insufficient to sustain the charge of unlawful conspiracy relating to the procurement of the indictments, but held that refusal to sign the immunity waiver was in effect a refusal to testify unless immunity be granted them, and was therefore conduct unbecoming a police officer and cause for dismissal. The discharged officers instituted separate proceedings for writs of *certiorari* to review the action of the Civil Service Commission. The trial judge who heard the petitions entertained motions to quash the writs, and in a written opinion found that 'the Commission acted very carefully and certainly exercised no prejudice against the plaintiffs herein in its conduct of said proceeding . . . it gave ample opportunity to the plaintiffs to be heard in their own defense and in its finding and decision reflects what the record shows, a frank and honest statement of the facts favorable to each of the plaintiffs,' but gave as his reasons for sustaining the officers' motions (1) that while they did refuse to sign an immunity waiver when called before the grand jury, they at no time refused to testify, and (2) that as a matter of law the refusal of the officers

to waive their constitutional privilege in advance of testifying did not constitute cause for removal. Because the trial court held that the discharge of petitioners for failure to execute in writing an immunity waiver would deprive them of their constitutional rights, defendants perfected a direct appeal to the Supreme Court of Illinois, which held (*Drury* v. *Hurley* (1949), 402 Ill. 243) that 'there is no constitutional question involved in this proceeding such as would give us jurisdiction,' and accordingly transferred the cause to this court for determination."

The Supreme Court of Illinois, in transferring the cause to the Appellate Court of Illinois, First District (*Drury* v. *Hurley*, 402 Ill. 243), found the facts to be as follows (pp. 244-245):

"April 24, 1947, the commissioner of police of the City of Chicago filed separate charges with the civil service commission of said city against appellee and Captain Thomas E. Connelly, both members of the police department of the city. The charges were similar as to each, and by stipulation were heard jointly by the commission, but separate decisions and findings were made in each case.

Appellee and Connelly had been assigned the duty of investigating the murder of one James M. Ragen which took place June 24, 1946. Through their efforts witnesses were found whose testimony aided in having three persons indicted for the murder of Ragen. Thereafter two of the witnesses who testified before the grand jury recanted their former testimony and accused appellee and Connelly, in substance, of intimidating them and forcing them to testify before the grand jury. The story of these witnesses led to an investigation of the actions of the police officers and they were indicted with others for conspiracy to procure a false indictment for the murder of Ragen against those charged with that crime.

Appellee and Connelly were called as witnesses before the grand jury investigating the charge against them and requested to sign immunity waivers which

they refused to do. Following is a copy of the immunity waiver:

'I, ... have been advised of my legal rights, I now know I cannot be compelled or forced to give testimony against myself before the Grand Jury or any Court. I now know I do not have to make any statement nor give any answers to any question that may tend to incriminate me. I now know that whatever I say here can be used against me in any criminal proceeding involving the subject matter of my testimony.

No one has forced me, by threats or otherwise, or promised me anything either directly or indirectly to appear and testify before the Grand Jury.

Of my own free will and with full knowledge of my rights in this matter I am willing to testify before the Grand Jury and I hereby waive all claim of immunity that I may have by reason of my appearing and giving testimony before the Grand Jury concerning certain matters of which I have knowledge.'

The officers thereafter were charged with conduct unbecoming a police officer in refusing to sign said immunity waiver, were tried by the commission and found guilty and were ordered removed from service. On *certiorari* in the superior court the action of the commission was set aside and this appeal followed."

It will be noted that the statement of facts by the Supreme Court of Illinois is, in legal effect, the same as the findings of fact by the Appellate Court.

POINTS AND AUTHORITIES.

I.

The petitioners failed to raise any constitutional issues in the State Courts, and are, therefore, precluded from seeking a review in this Court.

Drury v. *Hurley*, 402 Ill. 243.
Drury v. *Hurley*, 339 Ill. App. 33.
1949 Ill. Rev. Stat. ch. 24½, par. 51.
1949 Ill. Rev. Stat. ch. 110, par. 199.
Prudential Ins. Co. v. *Richman*, 292 Ill. App. 261.
Penman v. *Village of Philo*, 309 Ill. App. 49.
Wilson v. *Cook*, 90 L. Ed. 793, 327 U. S. 474.
Neblett v. *Carpenter*, 83 L. Ed. 182, 305 U. S. 297, 59 S. Ct. 170.
Cooper v. *Palais Royal Theatre Co.*, 320 Ill. 44, 49.
Oliver v. *Retirement Board*, 375 Ill. 641, 642.
Dean v. *Board of Education*, 386 Ill. 156, 157.

II.

The petitioners waived all constitutional issues, if any, by not appealing to this court from the judgment of the Supreme Court of Illinois which transferred the cause to the Appellate Court of Illinois, First District.

Drury v. *Hurley*, 402 Ill. 243.
The People v. *Richardson*, 397 Ill. 84.
The People v. *Rosenthal*, 370 Ill. 244, 247.
Central U. Teleph. Co. v. *Edwardsville*, 70 L. Ed. 229, 269 U. S. 190, 46 S. Ct. 90.
Parker v. *Illinois*, 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708.

III.

The Appellate Court of Illinois properly held that the petitioners' refusal to sign an immunity waiver, prior to testifying before the Grand Jury, concerning matters arising out of and during the course of their employment was "cause" for removal.

Bowles v. *Misle*, 64 Fed. Supp. 835.

Wilson v. *United States*, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771.

Shapiro v. *United States*, 335 U. S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787.

In Re Holland, 377 Ill. 346.

People Ex Rel. Clifford v. *Scannell*, 77 N. Y. Supp. 704.

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United Public Workers v. *Mitchell*, 91 L. Ed. 754, 330 U. S. 75, 67 S. Ct. 556.

Goldway v. *Board of Higher Education*, 37 N. Y. S. 2nd, 34.

Souder v. *City of Philadelphia*, 156 Atl. (Pa.) 245.

Scholl v. *Bell*, 102 S. W. (Ky.) 248.

Christal v. *Police Com. of San Francisco*, 92 P. 2nd. (Cal.) 416.

Canteline v. *McClellan*, 24 N. E. 2nd (N. Y.) 972.

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O'Regan v. *City of Chicago* (cited with approval in the case of *Coane* v. *Geary*, 298 Ill. App. 199, 206).

In Re Harriss, 364 Ill. 290.

IV.

Class legislation and discrimination is not an issue in the case at bar.

The People v. *Kipley*, 171 Ill. 44.
The People v. *City of Chicago*, 237 Ill. 100.

ARGUMENT.

I.

The petitioners failed to raise any constitutional issues in the State Courts and are, therefore, precluded from seeking a review in this court.

The Trial Court, in its reasons for its decision sustaining the motion of the petitioners to quash the record, stated (Abst. 131-132):

> "This Court holds, as a proposition of law, that a refusal of the plaintiffs, Connelly and Drury, to execute in writing an immunity waiver and to waive in advance their constitutional rights, under the circumstances disclosed by this record showing no refusal to testify before the Grand Jury and showing that they freely testified before the Civil Service Commission which exonerated them, does not constitute cause for removal. To permit a record such as the one returned in this cause to stand would deprive the plaintiffs of their constitutional rights and do violence to the provisions of Section 12 of the Civil Service Act, prohibiting removal except for just cause."

Because of the statement of the Trial Court that "To permit a record such as the one returned in this cause to stand would deprive the plaintiffs of their constitutional rights * * *" the Civil Service Commission perfected an appeal to the Supreme Court of Illinois (*Drury* v. *Hurley*, 402 Ill. 243). The Supreme Court of Illinois in holding that there was no constitutional question involved and in transferring the cause to the Appellate Court of Illinois, for the First District, said (pp. 246-247):

> "We have uniformly held that there is no constitutional question presented such as to give us jurisdic-

tion of a direct appeal where the judgment or decree is assailed on the ground that its enforcement will deprive the person against whom enforcement is sought of some constitutional right. A few cases so holding are *Chapralis* v. *City of Chicago,* 389 Ill. 269; *Trustees of Schools* v. *City of Chicago,* 373 Ill. 508; *O'Connor* v. *Rathje,* 368 Ill. 83; *Cooper* v. *Palais Royal Theatre Co.* 320 Ill. 44.

"The prayer for relief in the lower court was that a writ of *certiorari* issue commanding the commissioners to certify and file a complete record of the proceedings of the civil service commission and that the finding and order of said commissioners be reversed and set aside as wholly for naught esteemed. It will be noted that there was no request for a construction of any constitution. The superior court did not construe any constitution and no error assigned indicates that it did. Before this court will take jurisdiction on the ground that a constitutional question is involved, it must appear from the record that a fairly debatable constitutional question of the character mentioned in the Civil Practice Act was urged in the lower court, the ruling on which is preserved in the record for review and error assigned thereon in this court. *Perlman* v. *Thomas Paper Stock Co.* 378 Ill. 238; *People ex rel. Rexses* v. *Cermak,* 317 Ill. 590; *Griveau* v. *South Chicago City Railway Co.* 213 Ill. 633.

"The mere assertion that a constitutional question is involved or that a constitutional right has been invaded is not sufficient, in the absence of other grounds, to confer jurisdiction, (*Hawkins* v. *Hawkins,* 350 Ill. 227,) as no duty rests upon the court to discover a basis on which jurisdiction to entertain the appeal can be sustained. (*Economy Dairy Co.* v. *Kerner,* 371 Ill. 261; *City of Chicago* v. *Peterson,* 360 Ill. 177; *People* v. *Davies,* 350 Ill. 48.) It seems clear in this case that neither party is complaining of any constitutional provision, nor is either party requesting the construction of any constitutional provision. The difference between them seems to be whether or not the exercising of a right in refusing to sign the immunity waiver is ground for removal."

The Appellate Court (*Drury* v. *Hurley*, 339 Ill. App. 33), in reversing the judgment of the Trial Court and sustaining the action of the Civil Service Commission of the City of Chicago discharging the petitioners from the Police Department of the City of Chicago, took cognizance of the decision of the Supreme Court of Illinois which stated that there was no constitutional question involved, saying (p. 37):

> "Because the trial court held that the discharge of petitioners for failure to execute in writing an immunity waiver would deprive them of their constitutional rights, defendants perfected a direct appeal to the Supreme Court of Illinois, which held (*Drury* v. *Hurley* (1949), 402 Ill. 243) that 'there is no constitutional question involved in this proceeding such as would give us jurisdiction,' and accordingly transferred the cause to this court for determination."

The fact that the Appellate Court did not consider any constitutional question is apparent when it stated the question presented to it for decision to be (p. 42):

> "The basic question is not the right of the police officers to exercise a constitutional privilege, but whether their refusal to sign an immunity waiver was a breach of their public trust which impaired the efficiency standards and morale of the police department of the City of Chicago and therefore constituted conduct unbecoming a police officer and was 'cause' for removal under section 12 of the Civil Service Act."

It is apparent, therefore, that neither the Supreme Court nor the Appellate Court of Illinois determined a constitutional question but rather limited their decisions to a construction of the statute, namely, whether petitioners' refusal to sign immunity waivers constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois (1949 Ill. Rev. Stat., ch. 24½, par. 51). In fact the

Appellate Court is without jurisdiction to consider constitutional questions (1949 Ill. Rev. Stat. ch. 110, par. 199; *Prudential Ins. Co.* v. *Richman,* 292 Ill. App. 261; *Penman* v. *Village of Philo,* 309 Ill. App. 49).

This court and the Illinois Supreme Court have consistently held that the construction of a statute does not raise a constitutional issue.

Wilson v. *Cook,* 90 L. Ed. 793, 327 U. S. 474.
Neblett v. *Carpenter,* 83 L. Ed. 182, 305 U. S. 297, 59 S. Ct. 170.
Cooper v. *Palais Royal Theatre Co.,* 320 Ill. 44, 49.
Oliver v. *Retirement Board,* 375 Ill. 641, 642.
Dean v. *Board of Education,* 386 Ill. 156, 157.

In *Wilson* v. *Cook,* 90 L. Ed. 793, 327 U. S. 474 this court said (90 L. Ed. 799):

> *"Under Section 237 of the Judicial Code we are without jurisdiction of the appeal in No. 328, unless there was 'drawn in question' before the Supreme Court of Arkansas 'the validity of a statute' of the state, 'on the ground of its being repugnant to the Constitution, . . . or laws of the United States.' The purpose of this requirement is to restrict our mandatory jurisdiction on appeal. Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651, 86 L. ed. 1090, 1094, 62 S. Ct. 857, *and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, Charleston Fed. Sav. & L. Asso.* v. *Alderson,* 324 U. S. 182, 185, 186, 89 L. ed. 857, 860, 861, 65 S. Ct. 624 and cases cited, or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it. *Fisk* v. *Kansas,* 274 U. S. 380, 385, 71 L. ed. 1108, 1110, 47 S. Ct. 655 and cases cited. *This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court*

of the state, Wall v. *Chesapeake & O. R. Co.,* 236 U. S. 125, 126, 65 L. ed. 856, 857, 41 S. Ct. 402; *Citizens Nat. Bank* v. *Durr,* 257 U. S. 99, 106, 66 L. ed. 149, 152, 42 S. Ct. 15, *or has in fact been decided by it, Nickey* v. *Mississippi,* 292 U. S. 393, 394, 78 L. ed. 1323, 1324, 54 S. Ct. 743; *Whitfield* v. *Ohio,* 297 U. S. 431, 435, 436, 80 L. ed. 778, 781, 782, 56 S. Ct. 532, *and that its decision was necessary to the judgment. Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 304, 61 L. ed. 1153, 1157, 37 S. Ct. 643 and cases cited. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground." (Italics ours.)

In the case at bar the Supreme Court of Illinois specifically held that there was no constitutional question involved; that no constitutional issue was presented by the record; and transferred the cause to the Appellate Court of Illinois, First District. The Appellate Court stated that the only issue presented to it for decision was the construction of a statute as to whether the petitioners' refusal to sign immunity waivers constituted conduct unbecoming a police officer which was "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois. The record fails to disclose a federal constitutional question presented to the court for decision and, therefore, the petition for writ of certiorari should be denied.

II.

The petitioners waived all constitutional issues, if any, by not appealing to this court from the judgment of the Supreme Court of Illinois which transferred the cause to the Appellate Court of Illinois, First District.

In their petition the petitioners state (pp. 22-23):

> "In a petition for rehearing filed before said Civil Service Commission it was urged in paragraphs 11, 12, 13, 14 and 18, thereof that the rights of petitioners under the Fifth Amendment to the United States constitution were violated by the ruling, findings and order of the Civil Service Commission, and was raised in the petitions for Certiorari in the Superior Court of Cook County (Drury Abst. 66, 67). And in paragraph 14 thereof it was pointed out that rights had been accorded to a lawyer and denied to petitioners as policemen.
>
> "The Superior Court of Cook County was asked to quash the record of the Civil Service Commission upon the ground that it violated the Fourteenth Amendment to the United States Constitution (Drury Abstract 119). And in reversing and quashing the return and record of the Civil Service Commission the Judge in his opinion held that the discharge because of refusal to waive the constitutional right against self-incrimination under the instant circumstances was not warranted (Drury Abstract 131)."

The Supreme Court of Illinois in transferring the cause to the Appellate Court (*Drury* v. *Hurley,* 402 Ill. 243) concluded (p. 247):

> "In our opinion there is no constitutional question involved in this proceeding such as would give us jurisdiction and the cause is therefore transferred to the Appellate Court for the First District.
>
> *Cause transferred.*"

The decision of the Supreme Court, in transferring the cause to the Appellate Court because in its opinion there was no constitutional question involved, was directly contrary to and overruled the theory of the petitioners that the decision of the Civil Service Commission violated the Fifth and Fourteenth Amendments to the United States Constitution. If the petitioners were of the opinion that the action of the Civil Service Commission violated the Fifth and Fourteenth Amendments of the United States Constitution (as they now contend) they should have appealed to this court from the decision of the Supreme Court of Illinois transferring the cause to the Appellate Court, for the First District. By failing to perfect such an appeal, and joining issue in the Appellate Court, the petitioners waived all constitutional questions.

The People v. *Richardson*, 397 Ill. 84.
The People v. *Rosenthal*, 370 Ill. 244, 247.
Central U. Teleph. Co. v. *Edwardsville*, 70 L. Ed. 229, 269 U. S. 190, 46 S. Ct. 90.
Parker v. *Illinois*, 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708.

In *Parker* v. *Illinois*, 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708, this court said (92 L. Ed. 888-889):

> "The Court said in the Edwardsville Case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. 269 U. S. pp. 194, 195, 70 L. ed. 231, 46 S. Ct. 90. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the

requirement. We adhere to that decision. The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed."

It is apparent that the petitioners, by failing to appeal from the judgment of the Supreme Court of Illinois transferring the cause to the Appellate Court for the First District, have waived all Federal and State constitutional issues, if any were presented by the record to the Supreme Court of Illinois. Therefore, their petition for certiorari should be denied.

III.

The Appellate Court of Illinois properly held that the petitioners' refusal to sign an immunity waiver, prior to testifying before the Grand Jury, concerning matters arising out of and during the course of their employment was "cause" for removal.

The trial court, in its written opinion, adopted the findings of fact of the Civil Service Commission but concluded that the Civil Service Commission erred in holding that petitioners' refusal to sign immunity waivers prior to testifying before the Grand Jury was conduct unbecoming a police officer and therefore cause for removal. The court held that if the decision of the Commission was permitted to stand, it would deprive the petitioners of their constitutional rights and do violence to the provisions of Section 12 of the Cities Civil Service Act (Abst. 134, 135).

We have no quarrel with the theory of the trial court that the petitioners could, under the Constitution, refuse to sign the immunity waivers. It is, however, our contention

that under the law the people are entitled to that security of their persons and property which can be assured only if police officers are men whose standards of character, responsibility and deportment are higher than those which the trial court seems to think the people ought to be forced to accept. The law does not give to any one the right to decree that the citizens must expect no greater protection of law and order, no greater security of their life and their property, than will be assured them by police officers who are permitted to place limits and conditions upon their disclosure of crime and their assistance in its prosecution. When these limits and conditions are insisted upon in cases where the police officer's own official conduct is under investigation, the effect upon popular respect for the law-enforcing agencies of the government is certain to be harmful to the community. The harm is augmented, rather than lessened, by holding that when a policeman faces the question of subordinating a constitutional privilege to discharge of his extraordinary responsibility as an officer of the law he owes no higher duty to the public interest than the thief, thug, burglar, murderer or other law-breaker whom it is his duty to apprehend and prosecute. The law does not compel any man to be a police officer. When he chooses to become one he assumes obligations to the public interest which do not rest upon the people in general.

The basic question here is not the petitioners' right to exercise a constitutional privilege but rather whether their refusal to sign the immunity waiver was a breach of their public trust which impaired the efficiency standards and morale of the police department of the City of Chicago and, therefore, constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service Act.

Although we do not contend that the petitioners must, as police officers waive their constitutional immunity, there is substantial authority that under certain circumstances an individual, because of his employment, business or occupation or duties, is considered to have waived the right to assert his personal privilege against self-incrimination. This, even though no overt action on his part had been taken.

In *Bowles* v. *Misle,* 64 Fed. Supp. 835, the court, after reviewing many cases holding individuals may, under certain circumstances, be considered to have waived their personal privilege against self-incrimination, said (p. 843):

> "And with it, is and may well be, bracketed the further consideration that the immunities of the 4th and 5th amendments are not absolute, but are rather subject to waiver and that he who enters into, or continues in, a business subject to official regulation voluntarily submits his business records and papers to such visitorial examination as the law contemplates, and, in that measure waives his constitutional immunities of privacy in respect of his papers and against compulsory testimony."

See also *Wilson* v. *United States,* 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, where this court distinguished between *private* and *public* papers and documents and held that a public officer could not assert a plea of constitutional privilege against self-incrimination when called upon to produce the *public* papers and documents in a criminal proceeding. Surely there is no distinction between a public officer withholding *public* papers and documents and a police officer withholding the facts arising out of and during the course of his *public* employment as a police officer.

This court, in the recent case of *Shapiro* v. *United States,* 335 U. S. 1-77, 68 S. Ct. 1375, 92 L. Ed. 1787, held that the statutory immunity against self-incrimination does not

extend to the production of records which were required to be kept by a valid regulation issued under the authority of the Emergency Price Control Act because such records became *public* documents as to which no constitutional privilege against self-incrimination attaches.

The trial court based its decision on the case of *In re Holland*, 377 Ill. 346 (Abst. 128, 129), which is readily distinguishable from the case at bar. Even there the court held that under certain circumstances it might be considered that an individual has waived his personal privilege against self-incrimination, saying (p. 356):

> "To say that one has an absolute right to a privilege, but if he exercise it he will be punished, is to limit his enjoyment of that right, *and unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right,* we are unable to see wherein it can be said that an individual, be he judge, lawyer or layman, is either legally or morally guilty of a wrong should he claim the right." (Italics ours.)

That the court had in mind a police officer when it inserted the condition *"and unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right"*, is clearly shown when the court said (p. 358):

> "It can scarcely be said that the duty resting upon a lawyer to assist in investigation of crime, a duty with which he is generally through not specifically charged, *as is a policeman,* outweighs, when considered from the standpoint of legal ethics, his moral as well as legal right to claim the constitutional privilege herein referred to in cases where he, in good faith, fears that he, though innocent, may be subjected to criminal prosecution." (Italics ours.)

In short, the *Holland* case did not, as here, involve the conduct of a *police officer,* who by reason of his position

was, as the court viewed it in that case, specifically charged with the duty of disclosing any evidence of crime.

From the foregoing it is apparent that the Supreme Court of Illinois has impliedly stated that a policeman, because of the circumstances surrounding him and the duties placed upon him should, in honesty and good conscience, waive his constitutional right against self-incrimination.

However, we do not question that the petitioners have the constitutional right to refuse to sign an immunity waiver. We contend that in refusing to do so, under the circumstances in this case, they acted in violation of their duties, failed to measure up to the high standards of character and moral conduct incumbent upon trusted police officers and were therefore guilty of conduct unbecoming police officers and subject to removal under Section 12 of the Cities Civil Service Act.

In *People ex rel. Clifford* v. *Scannell*, 77 N.Y. Supp. 704, Scannell, a fireman, was connected with an association intended to effect legislation for or on behalf of the fire department, or officers or members thereof in violation of the Charter of Greater New York, and the rules and regulations of the fire department. Charges were placed against him and his removal was ordered. He contended that unless his act in this regard would be upheld, his right as a citizen would be abridged and, therefore the provisions of the Charter and the rules and regulations were in violation of the State Constitution. The court overruled his contention saying (p. 709):

> "There is no foundation for the claim, either in law or reason. Neither the fire department, acting through its officers, nor the legislature of the state, has in the slightest degree abridged the rights of the relator in any respect. The fire department, like all

other large bodies of men, requires rules for its maintenance and discipline, without which it would be a mere mob, uncontrolled and uncontrollable, and destroyed, in every sense, for efficiency of service. What is true of it is also true of all the other branches of government where many men are employed, and where control must be had, and disipline maintained. The right of the relator to freely petition with others, to exercise the right of free speech, and to write for publication is as perfect at the present moment as it ever was; but for the purpose of discipline, absolute and necessary for the maintenance of the fire department as an efficient corps, he may not do such things in connection with such department while he is a member of it, either openly as a fireman, or under guise of an American citizen. By becoming a member of the force, he at the same time became subject to discipline according to its rules; and those rules he must obey, or be the subject of dismissal. He may not then freely write, speak, or publish, if thereby the law and the rules be violated. It is to them that he owes obedience, and if, he be not willing to yield it, his right as free and untrammeled as it ever was to emancipate himself from the shackles of the department, and exercise his right as an American citizen, whether it violate the rules of the department or not. It is therefore erroneous to say that his right of citizenship is abridged in any particular, and the courts have so held. *U. S.* v. *Newton,* 20 D. C. 226; *U. S.* v. *Curtis* (C. C.) 12 Fed. 824; *Ex parte Curtis,* 106 U. S. 371; 1 Sup. Ct. 381, 27 L. Ed. 232. The relator, being a member of the uniformed fire force of the fire department, was clearly subject to the rules and regulations of such department, and, if he violated them, was subject to dismissal. *People* v. *Board of Fire Com'rs,* 77 N. Y. 153. The power of removal by the commissioner exists for violation of the rule, and such power has been frequently exercised under similar circumstances. *People* v. *Board of Police Com'rs,* 93 N. Y. 97; *People* v. *Police Com'rs,* 11 Hun, 403; *People* v. *French,* 32 Hun, 112."

In *McAuliffe* v. *Mayor, etc., of City of New Bedford,* 29 N. E. (Mass.) 517, the plaintiff filed a petition for manda-

mus to be restored to the office of policeman in New Bedford, he having been found guilty of violating the rule of the Police Department that no member of the Department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever. The plaintiff contended that the rule was invalid, as invading the plaintiff's right to express his political opinions; and that a breach of it was not cause sufficient for removal, under the statute. The court overruled the contention of the plaintiff saying (p. 517):

> "One answer to this argument is * * * that there is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. *The petitioner may have a constitutional right to talk politics, but he has no contitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract.* The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control." (Italics ours.)

Also see *United Public Workers* v. *Mitchell,* 91 L. Ed. 754, 330 U. S. 75, 67 S. Ct. 556 where this court upheld the constitutionality of the Hatch Act which provided among other things that "No officer or employee in the executive branch of the Federal Government * * * shall take any active part in political management or in political campaigns."

In *Goldway* v. *Board of Higher Education,* 37 N. Y. S. 2nd, 34, the petitioner was employed as an assistant teacher of English in a high school in the State of New York. He appeared at a public hearing of the Joint Legislative

Committee to investigate the educational system of the State of New York in answer to a personal subpoena served upon him, and declined to sign a waiver of immunity. Because of this refusal he was directed to leave the witness stand and was not sworn nor did he give any testimony. Because of his action he was discharged for violating Section 903 of the New York City Charter which provided for discharge of an employee of the city who shall, after lawful notice of process, refuse to appear before any Legislative Committee or shall refuse to waive immunity from prosecution. The plaintiff contended that the statute was unconstitutional. The court in overruling the contention of the plaintiff said (p. 36):

> "The privilege against self-incrimination is not as ancient as many of our other constitutional safeguards; indeed, it may be said to be of comparatively recent origin. Taking account of its genesis, some competent students of constitutional limitations have suggested that it has outlived its sanction; and that now, it is more mischievious than salutary in its operation. Respectable authorities may readily be invoked in support of its extinction; and it is generally agreed, I think, that in all events, it should be withdrawn altogether from public officers and employees whose official conduct is under scrutiny. However all this may be, it is clear that the statute under attack here is not violative of any constitutional restriction since there is no denial of the privilege against self-incrimination. The Legislature did not purport to abrogate the right; it undertook to exercise its discretion as to the wisdom of retaining in public service an employee who exercised the privilege when his official acts are under review. It cannot be said that it is so manifestly unreasonable as to be beyond its constitutional competency for the State to determine that it is not salutary for it to continue in its employ a person who obstructs an investigation into his public conduct by a refusal to waive immunity. Clearly it is a legislative prerogative—and not for the courts to review its wisdom

—to say that it is proper that public officials should not be permitted to hold office and at the same time shield themselves by a claim of privilege in the course of an investigation of their official acts.

The Charter provision does not preclude any City employee from refusing to testify or compel him to waive immunity; indeed, that privilege was accorded to and the right was exercised by this petitioner. It does not follow that upon such refusal, constitutionally he must be permitted to retain his office. Whether the claim of privilege should be a valid ground for dismissal, becomes a matter for the controlling wisdom of the law making power. For the right to hold public employment is a privilege which may reasonably be qualified by legislative action; and I conceive that such a qualification as set forth in Section 903 may not be said to be so unreasonable as to justify the courts in striking down the statute. As Mr. Justice Holmes epitomized it in a case involving cognate considerations, 'the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman'. *McAuliffe* v. *City of New Bedford,* 155 Mass. 216, 29 N. E. 517." (Italics ours.)

In *Souder* v. *City of Philadelphia,* 156 Atl. (Pa.) 245, the Grand Jury was investigating certain police officials of the City of Philadelphia. Souder, a Captain of Police, was unable to explain satisfactorily the source of his large personal estate. Charges were brought against him by the Civil Service Commission of conduct unbecoming an officer. In the Civil Service Commission's finding a majority of the Civil Serice Commission set forth that Souder had made no defense to the charges, and that in their opinion it was his duty to answer them, and they therefore found him guilty of conduct unbecoming an officer and dismissed him from the service. The court in sustaining the action of the Commission said (p. 246):

"Souder was a captain of police, whose duty it was not only to guard and protect the citizens of the mu-

nicipality which had honored him with its confidence by appointing him to the high position of trust and civic responsibility which he filled and to run down and bring to justice malefactors within its limits, but also, as an officer in high command of its police, to preserve and enforce discipline among those over whom he had been placed in a position of authority. It was essential in the proper discharge of his duties that he should comport himself as an officer in such manner that no act of wrongdoing should attach itself to him, to the end that those who served under him should feel for him that respect which insures confidence and obedience. As such an officer in such a station he should have been keen to see that no taint of evil doing attached itself to him, and when charges were made, reflecting upon his honesty and integrity, that they were met with denial and answering proofs of not delinquencies."

In the case of *Scholl* v. *Bell*, 102 S. W. (Ky.) 248, certain police officers refused to testify in the trial court in the exercise of their constitutional privilege against self-incrimination. The court in condemning their action said (p. 261):

"Here were police officers being interrogated as to existence of crimes they were paid to prevent, if possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him?"

In *Christal* v. *Police Com. of San Francisco*, 92 P. 2nd (Cal.) 416, the appellants were formerly police officers in the city and county of San Francisco. During a Grand

Jury investigation they were subpoenaed to appear and testify. They refused to testify concerning their acts and conduct and thereafter charges were filed against them for conduct unbecoming an officer and disobedience or orders. The police commissioners discharged them. A rule of the police department provided that members of the department should testify without reservation in any investigation conducted before the Grand Jury as well as in cases before the courts. The court in affirming the action of the police commissioners said that the main question involved was whether appellants, while holding positions as police officers, could exercise the constitutional privilege of refusing to testify before the Grand Jury under the circumstances and still insist upon retaining their positions as police officers. The court stated that it was of the opinion that they could not and that its conclusion was reached without resort to a consideration of the violation of the rule of the police department. The court in discussing the duties of a police officer said (p. 419):

> "The duties of police officers are many and varied. 21 Cal. Jur. 400 *et seq.* Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury. *It is for the performance of these duties that police officers are commissioned*

and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show, that he himself has engaged in criminal activities.'' (Italics ours.)

The court in discussing the question of constitutional immunity said (p. 419):

"We are not unmindful of the constitutional privilege above mentioned which may be exercised by all persons, including police officers, in any proceeding, civil or criminal. *In re Lemon, supra; In re Hoertkorn, supra.* As we view the situation, when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. *Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. McAuliffe* v. *Mayor of New Bedford,* 155 Mass. 216, 29 N. E. 517. *We are of the opinion that such a violation of duty would constitute cause for dismissal even in the absence of any specific rule requiring such officers to give testimony before the grand jury, or of any specific rule relating to 'conduct unbecoming an officer'. That such conduct constituted 'conduct unbecoming an officer', there can be no doubt.* (Italics ours.)

* * * * * *

There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment. One of the most cherished

rights guaranteed by the constitution is that of freedom of speech, yet no one would maintain that a police officer could fully exercise that right without violating the duties imposed upon him by the acceptance of his employment as a police officer. The right of freedom of speech might be relied upon by a police officer who had disclosed, to persons conducting an illegal establishment, information concerning the plan of the police department to conduct a raid upon such establishment, but the furnishing of such information would be inconsistent with and violative of the duties of such police officer. Such conduct would constitute cause for dismissal with or without any specific rule on the particular subject, and in the event of the adoption of a rule providing for dismissal of any officer making such disclosure, the claim that such rule violated any constitutional right of the officers would be clearly untenable."

The case of *Canteline* v. *McClellan,* 25 N. E. 2d (N. Y.) 972, decided by the New York Court of Appeals in 1940, involved the removal of a police officer for *refusal to sign an immunity waiver.* There the court cited with approval the *Christal* case in California, in which police officers were discharged *for refusal to testify* and observed that a "similar question" was presented in that case. The New York Court obviously regarded the action of a police officer in refusing either to sign an immunity waiver or in refusing to testify as involving a similar breach of duty.

It is true that in the *Christal* case there was a police department rule requiring police officers to testify and that in the *Canteline* case there was a provision in the State Constitution bearing on the refusal to testify (although this provision went into effect after the refusal involved in that case), but in both the *Christal* and *Canteline* cases the courts made it plain that their decision did not depend on any such rule or constitutional provision.

Several of the police cases cited herein were reviewed by the court in the case of *In re Holland,* 377 Ill. 346. The court distinguished these cases from the case then under consideration on the ground that (p. 357):

> "In such cases it was recognized that the officer was especially charged with the duty to prevent crime and to disclose any evidence that would assist in the apprehension of criminals."

The court then stated (p. 358) that in its opinion a policeman had the specific duty to assist in investigation of crime. It is therefore apparent that the *Holland* case sustains our contention that the petitioners' refusal to sign an immunity waiver preliminary to testifying before the Grand Jury on matters arising out of and within the scope of their duties, was conduct unbecoming a police officer and subjected the petitioners to removal.

In 15 St. John's Law Review, page 51, there is a complete discussion of the matter involved in the case at bar and the writer there stated:

> "A police officer is a state or public officer. The municipality appoints him as a matter of convenience, under state-granted authority. His duties are more than local. They are public in nature and include the governmental function of preserving peace and order for the public at large. As his civil responsibility he must prevent and aid in the detection of crime and protect the citizens at large. The security of the community and the efficiency of the government's executive system depend on the extent to which he performs his duties and is faithful to his trust. It is the duty of all citizens, government officials, and especially police officers, to aid in the administration of justice and to disclose information which might tend to bring about the apprehension and punishment of the guilty. When summoned, it is incumbent on them to attend and be sworn by the grand jury or any other investigatory body. They must testify freely of facts within their knowledge, although subjecting themselves to

> self-incrimination. A refusal to answer for such cause is a breach of duty, and is 'conduct unbecoming an officer', subjecting him to dismissal."

There appears to be no reported case in any jurisdiction upholding the right of a police officer to refuse either to sign an immunity waiver or to testify when called to testify in a criminal case.

Of the four cases herein cited involving police officers, three involving a refusal to testify and one a refusal to sign an immunity waiver, all are consonant with the principle that a police officer by reason of his special status, duties and responsibility may not in any manner exercise his constitutional privilege against self-incrimination in matters touching upon his occupation without being guilty of a breach of duty on his part by such refusal.

In *O'Regan* v. *City of Chicago* (Chicago Legal News, Vol. 37, p. 150, Dec. 24, 1904) Judge Murray F. Tuley rendered an opinion (cited with approval in the case of *Coane* v. *Geary,* 298 Ill. App. 199) in which he stated (p. 206 of the *Coane* case):

> "A police force is peculiar, *sui generis,* you may say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force, organized under the laws of the United States and equally as important as to the functions it is required to perform. It is not an ordinary branch of the executive government like the mayor's office even, your water department, the comptroller's department, the health department, even; but, as I say, it is peculiar to itself, and to look at it in the same light that other branches of the executive department are regarded would be a mistake in a judicial decision. It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of a controlling head just as much as the common soldier must surrender his own opinion

and power of action to that of his commanding officer. And there is the same necessity of discipline—of regulation existing in the police department that exists in regard to the military department. Strict discipline must be enforced, and it must be enforced in a manner that is effective, and without the supervision or regulation of any other department of the state, and particularly, without any attempt on the part of the judicial department (which is a branch of the government entirely distinct and separate from the executive department), to regulate it in any way, and particularly, to regulate its discipline."

The trial court, in its written opinion, stresses the fact that the Commission has specifically dismissed the charge against the petitioners that they unlawfully conspired to procure indictments (Abst. 130). The Commission merely held that the evidence introduced before it was insufficient to sustain the charge of unlawful conspiracy relating to the procurement of the indictment (Abst. 36). It should be borne in mind that although a conspiracy indictment was returned against the petitioners by the Grand Jury the case never went to trial but was *nolle prossed* by the State's Attorney because White, one of the State's Attorneys' principal witnesses, had been killed (Abst. 36). Also petitioners' refusal to testify before the Grand Jury blocked the State's Attorney from securing evidence which might convict the petitioners on the conspiracy indictment. The court asked (Abst. 130):

> "Since they (Connelly and Drury) have been specifically absolved from any wrong-doing, how can a stigma attach concerning their refusal to sign an immunity waiver regarding these matters?"

The fact that the Commission absolved the petitioners from any wrong-doing in the procuring of the indictments by the petitioners does not absolve them from conduct unbecoming a police officer for their refusal to sign an immunity

waiver. There were two charges filed before the Civil Service Commission against the petitioners. One was that they unlawfully conspired to procure indictments. This charge the Commission dismissed. The other charge was that they were guilty of conduct unbecoming a police officer because they refused to sign the immunity waiver. The petitioners admit that they refused to sign an immunity waiver. The Commission found that the petitioners refused to sign an immunity waiver. The trial court accepted the findings of fact of the Commission and therefore the trial court has found that the petitioners refused to sign an immunity waiver (Abst. 126). With this fact proven and admitted, under the cases discussed herein, the petitioners were guilty of conduct unbecoming a police officer and their removal by the Commission was with "cause" as provided for in Section 12 of the Civil Service Act. The contrary finding by the trial court was erroneous and the Appellate Court properly reversed the same.

(A) Discussion of In re Holland, 377 Ill. 346.

The Petition for Writ of Certiorari consists principally of a discussion of the facts and law in the *Holland* case and an attempt by the petitioners, through distortion of the facts, to bring the case at bar within the purview of the *Holland* decision. A proper understanding of that case will show that it cannot be interpreted in the manner contended for by the petitioners.

In the *Holland* case the "grand jury of Cook county was engaged in investigating the death of one Edward J. O'Hare who was killed * * * on the streets of Chicago" (p. 347). During the course of the investigation Holland, a Judge of the Municipal Court of Chicago, was called before the Grand Jury. He refused to sign an immunity

waiver. In testifying before the Grand Jury he answered all questions concerning the killing of O'Hare, declaring he knew nothing about it, but refused to answer, upon advice of counsel and under his constitutional rights, questions put to him pertaining to his association and business dealings with O'Hare. Previous to appearing before the Grand Jury, Holland had a conference with the First Assistant State's Attorney in which the utmost frankness and cooperation was shown by Holland in answering questions put to him, including questions on Holland's business transactions with O'Hare. Holland contended that the reason he refused to sign an immunity waiver was that there had been previous animosity between the State's Attorney and himself, growing out of political feuds of opposing factions in the same political party. Therefore, Holland became suspicious that the State's Attorney, instead of desiring to question him in the investigation as to the cause of death of O'Hare, was seeking to investigate Holland.

Proceedings were instituted to have Holland suspended from the practice of law for a period of two years. The court stated (p. 348) that Holland could be tried only as a lawyer and not as a judge. The question presented for decision in the *Holland* case was whether a lawyer, though possessing the constitutional privilege, "has nevertheless an overshadowing duty as a lawyer to refuse to exercise it in a case such as this, and that his failure to so refuse renders him subject to discipline" (p. 352). The court held that there is no duty resting upon a lawyer to assist in an investigation of crime saying (p. 358):

> "It can scarcely be said that the duty resting upon a lawyer to assist in investigation of crime, a duty with which he is generally though not specifically charged, as is a policeman, outweighs, when con-

> sidered from the standpoint of legal ethics, his moral as well as legal right to claim the constitutional privilege herein referred to in cases where he, in good faith, fears that he, though innocent, may be subjected to criminal prosecution."

The court also held that under certain circumstances it might be considered that an individual has waived his personal privilege against self-incrimination saying (p. 356):

> "To say that one has an absolute right to a privilege, but if he exercise it he will be punished, is to limit his enjoyment of that right, and unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right, we are unable to see wherein it can be said that an individual, be he judge, lawyer or layman, is either legally or morally guilty of a wrong should he claim the right."

That the court had in mind a police officer when it inserted the condition *"and unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right"* is clearly shown when the court, distinguishing the *Holland* case from the cases of other jurisdictions pertaining to police officers, said (p. 357):

> "*Amicus curiae* has cited cases where police officers were sought to be disciplined because they refused to answer questions put to them on the ground of constitutional privilege. In such cases it was recognized that the officer was especially charged with the duty to prevent crime and to disclose any evidence that would assist in the apprehension of criminals."

as well as when the court (p. 358) distinguished between the duty resting upon a lawyer and the duty resting upon a policeman.

The *Holland* case is readily distinguishable from the facts in the case at bar in the following respects:

1. In the *Holland* case the State's Attorney was attempting to investigate the conduct of Holland in regard to matters other than and foreign to the matter being investigated by the Grand Jury—the killing of O'Hare.

In the case at bar the Grand Jury, on April 2, 1947, was investigating the conduct of Drury and Connelly pertaining to their personal conduct as police officers (Abst. 32-35).

In the *Holland* case the Grand Jury was investigating the killing of O'Hare and not the association and business dealings that Holland had with O'Hare. In the case at bar the Grand Jury, on April 2, 1947, was not investigating the killing of Ragen but was investigating the conduct of Drury and Connelly in the performance of their duties as police officers.

If in the *Holland* case Judge Holland had refused to testify pertaining to the killing of O'Hare it is apparent from the court's opinion that the court would have disciplined him.

2. In the *Holland* case Holland claimed his constitutional privilege on the basis of being a lawyer and not as a judge. His association and dealings with O'Hare were on the basis of his being a lawyer and not a judge. It is apparent that if the Grand Jury were investigating the actions of Holland as a judge pertaining to the killing of O'Hare that, under such circumstances, Holland would not be justified in claiming his constitutional privilege. This is clearly shown when the court, in discussing the case of *In re Harriss,* 364 Ill. 290 (*Holland* case p. 358), pointed out that the acts of Harriss were judicial acts which subjected him to the strictest censure and condemnation.

Throughout the *Holland* case the court distinguishes the conduct and rights and duties of a lawyer or layman from the rights and duties of a policeman or other public officer in the performance of his official duties. The court clearly implies that a policeman, especially charged with the duty to prevent crime and to disclose any evidence that would assist in the apprehension of criminals, does not have the right to exercise his constitutional privilege in an investigation pertaining to his duties as a policeman and still retain his position as a police officer. The *Holland* case is authority for the proposition that a police officer, because of the circumstances surrounding him and the duties placed upon him should, in honesty and good conscience, waive his constitutional right against self-incrimination when being investigated pertaining to his duties as a policeman or forfeit his position in which he has sworn to protect the life and property of the persons residing in the community by which he is employed.

The respondents based their decision not upon the constitutional question of whether a police officer, because of the circumstances surrounding him and the duties placed upon him, has waived his right against self-incrimination, but on the fact that the petitioners, in refusing to sign an immunity waiver, under the circumstances in this case, acted in violation of their duties, failed to measure up to the high standard of character and moral conduct incumbent upon trusted police officers and were, therefore, guilty of conduct unbecoming a police officer and subject to removal under Section 12 of the Cities Civil Service Act.

3. The petitioners attempt to bring the facts in the case at bar in line with the facts in the *Holland* case by showing that in the *Holland* case Judge Holland testified freely before the Grand Jury pertaining to the O'Hare killing and that the petitioners in the case at bar testified

freely before the Grand Jury on March 14, 1947 (Abst. 30) when the Grand Jury was investigating the killing of Ragen. At that hearing Russell, White, and Davidson, together with Drury and Connelly, testified to the facts and circumstances surrounding the Ragen murder (Abst. 30). As a result of this investigation the Grand Jury on March 17, 1947 returned an indictment for the murder of Ragen against Block, Patrick, and Yaris (Abst. 32). This completed the Grand Jury investigation of the murder of Ragen.

On April 2, 1947 the Grand Jury was investigating White and Russell's change of testimony and also their charge that Drury and Connelly had intimidated them in order to force them to testify before the March Grand Jury, that they could identify Block, Patrick, and Yaris as the participants in the Ragen shooting (Abst. 32-33). It was during this investigation that Drury and Connelly were again called before the Grand Jury for questioning. It was during this investigation that Drury and Connelly, each in turn, appeared before the Grand Jury, and refused to sign immunity waivers (Abst. 33-34).

In this regard the facts in the case at bar are in no way analogous to the facts in the *Holland* case. Here Drury and Connelly refused to sign immunity waivers and did not testify before the Grand Jury on April 2, 1947 during an investigation of their conduct as police officers. The murder of Ragen was not being investigated at the time they were requested to sign immunity waivers. On April 2, 1947 the Grand Jury was investigating the conduct of Drury and Connelly and not the murder of Ragen.

4. The petitioners also attempt to bring the facts in the case at bar in line with the facts in the *Holland* case by showing that the court in the *Holland* case took cog-

nizance of the fact that there was animosity between the State's Attorney and Holland, and that Holland therefore became suspicious that the State's Attorney, instead of desiring to question him in the investigation as to the cause of the death of O'Hare, was seeking to investigate Holland. The petitioners, in the case at bar, continuously state that the State's Attorney was hostile to them and because of such hostility and animosity desired to indict Drury and Connelly regardless of their innocence or guilt pertaining to their conduct as police officers, and that by reason thereof they were justified in refusing to sign immunity waivers.

The record fails to disclose any hostility or animosity by the State's Attorney against Drury and Connelly, or either of them. It is well to remember that the Trial Court, in overruling the decision of the Civil Service Commission to discharge Drury and Connelly, accepted the Findings of Fact of the Commission (Abst. 120-121) and merely differed with the conclusion of the Commission on a question of law. The Findings of Fact of the Commission (Abst. 44-51) contain nothing from which the conclusion can be drawn that the State's Attorney was hostile or held any animosity towards Drury and Connelly. The only conversation between Drury or Connelly and the State's Attorney, appearing in the Findings of the Commission, is as follows (Abst. 47):

> "(13) At the conclusion of such questioning of Connelly he stated to the State's Attorney that he supposed that he was 'in bad' because of his former suspension and the State's Attorney replied substantially as follows:
>
> 'Just a moment, Captain, I had nothing to do with your former suspension and it has nothing to do with this hearing. Just remember this, that if I should ever have occasion to take you or any other police officer to the Trial Board (referring to this

Commission) I will have the evidence that will make the charges stick.'

"(14) Thereupon Captain Connelly repeated the said remarks of the State's Attorney to the respondent, and the respondent and Connelly were disturbed thereby and by the said questioning in the office of the said State's Attorney, and each told the Commissioner that he was willing to resign from the said Police Department if the Commissioner so desired, but were told by him not to get excited."

This discussion between Connelly and the State's Attorney fails to sustain the assertion of the petitioners. The petitioners, although repeatedly stating there was such hostility and animosity, fail to point to any place in the abstract where it can be found.

The petitioners do not confine their argument to the facts appearing in the record. They neglect to clearly state to this court that the Grand Jury on April 2, 1947 was investigating the conduct of Drury and Connelly in the performance of their duties as police officers. The investigation by the Grand Jury on April 2, 1947 concerned the conduct of Drury and Connelly in securing the testimony of White and Russell. The hearing was to determine whether Drury and Connelly had threatened to send White back to the penitentiary for a parole violation and promised him a $5,000 reward if he would identify Block, Patrick and Yaris as participants in the Ragen shooting (Abst. 33); whether Drury and Connelly harassed and threatened Russell to get him to identify pictures shown to him of supposed participants in the shooting (Abst. 33).

It is apparent that the Grand Jury investigation of April 2, 1947 was concerned with a matter separate and distinct from the investigation conducted on March 17, 1947 by the March Grand Jury. The investigation of April 2, 1947, was directed at the personal acts and conduct of Drury

and Connelly arising out of and during the course of their employment as police officers while investigating the Ragen shooting. It was at this investigation that Drury and Connelly refused to sign immunity waivers and testify to their acts and conduct as police officers. It was because of this refusal that the Commissioner of Police on April 24, 1947 filed the charges with the Civil Service Commission of the City of Chicago which led to their discharge (Abst. 28).

The State's Attorney, on April 2, 1947 with these facts in his possession, was duty bound to present such facts to the Grand Jury. It was not a question of hostility and animosity, if any, of the State's Attorney against Drury and Connelly, but a question of the State's Attorney performing his duty.

The petitioners argue (pp. 38-41) that they acted in good faith and refused to sign the immunity waivers because of the hostility of the State's Attorney and their knowledge that the State's Attorney intended to cause the Grand Jury to return an indictment against them. The purpose of compelling a witness before the Grand Jury to sign an immunity waiver prior to testifying is so that the testimony of said witness may be used against him in a criminal proceeding in the event an indictment is issued. If, as contended by the petitioners, they did nothing during their investigation of the Ragen murder which might result in a criminal indictment against them there would be no reason for them to refuse to sign an immunity waiver. They would have willingly signed the immunity waivers, testified fully and completely before the Grand Jury knowing that if the Grand Jury did return an indictment against them anything they might have said before the Grand Jury would not have harmed them or incriminated them in the criminal proceedings because

they would know that nothing they did during the investigation of the Ragen murder was contrary to the laws of the State of Illinois. Therefore, even if the State's Attorney was hostile toward the petitioners and even if the petitioners knew that because of such hostility the State's Attorney intended to seek an indictment against them by the Grand Jury it still was their duty, as police officers, to sign the immunity waivers and testify freely and fully before the Grand Jury. Any other action on their part destroys their usefulness as police officers of the City of Chicago. The mere fact that they refused to sign an immunity waiver, with or without the hostility of the State's Attorney and with or without their good faith, during a Grand Jury investigation concerning matters arising out of and during the course of their employment was "cause" for removal, under Section 12 of the Cities Service Act.

This thought is ably expressed in the opinion of the Appellate Court of Illinois, (*Drury* v. *Hurley,* 330 Ill. App. 33) when it said (p. 50):

> "In the light of what has been said we think the distinction between refusing to testify and the refusal to sign an immunity waiver before testifying before the grand jury is more imaginary than real, and as pointed out in the excellent analysis of the subject above referred to (Journal of Criminal Law and Criminology of Northwestern University, vol. 38, No. 6, March-April, 1948, p. 619, comments by Dale E. Sherrow.), "Refusal to sign an immunity waiver can mean only one thing—the person refusing to sign is unwilling to expose all he knows about certain alleged criminal activities because the exposure will tend to incriminate him. That is the only ground upon which this constitutional privilege can be invoked. Refusal to sign the waiver would seem to be just as much a breach a duty as an actual refusal to testify."

It is apparent that the petitioners' argument that their refusal to sign immunity waivers was justifiable and should not be "cause" for removal from the police department of the City of Chicago falls by its own weight. If they had not performed any criminal acts during their investigation of the Ragen murder they should have willingly signed the immunity waivers because their testimony before the Grand Jury would not incriminate them and would not be useful to the prosecution in a criminal proceedings. If, during their investigation of the Ragen murder, they performed certain acts contrary to the laws of the State of Illinois, and by reason thereof refused to sign the immunity waivers their usefulness as police officers ceased. The question involved in the case at bar is whether petitioners' refusal to sign the immunity waivers was a breach of their public trust which impaired the efficiency, standards and morale of the police department of the City of Chicago and, therefore, constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service act. The fallacious claim of the petitioners, unsupported by the record, that the State's Attorney was hostile toward them has no bearing on this ultimate and sole issue.

The Grand Jury, on April 2, 1947, was not investigating the killing of Ragen but rather the personal acts and conduct of Drury and Connelly arising out of and during the course of their employment as police officers. It was at this investigation that Drury and Connelly refused to sign immunity waivers. We do not contend that Drury and Connelly could not exercise their constitutional privilege in this regard. However, we do contend that if they did exercise such privilege and refused to testify before the Grand Jury as to their personal acts and conduct arising out of and during the course of their employment as police

officers, they acted in violation of their duties and failed to measure up to the high standards of character and morals incumbent upon trusted police officers and were, therefore, guilty of conduct unbecoming a police officer and subject to removal under Section 12 of the Cities Civil Service Act.

The petitioners have failed to meet this issue. Their petition for writ of certiorari is barren of a discussion of this all important point. They ignore it and argue that Drury and Connelly were justified in refusing to sign immunity waivers because the State's Attorney was hostile and antagonistic to them. We have ofttimes stated that the issue in the case at bar is not a question of the right or privilege of Drury and Connelly to refuse to sign immunity waivers, irrespective of the reason therefor—hostility or animosity of the State's Attorney, if any, or otherwise—but rather the right of the Civil Service Commission to discharge Drury and Connelly for failing to perform their police duties or by so acting as to impugn their own integrity and render them ineffective as law enforcing agents. The refusal to testify fully in cooperation with the law enforcing agencies renders Drury and Connelly, as police officers useless to the Police Department of the City of Chicago. They can hardly be expected to be considered diligent officers of the law when they had in effect admitted that they had something to conceal lest it incriminate them.

From the foregoing discussion of the *Holland* case and its application to the case at bar, it becomes apparent that the facts in the instant case are distinguishable from the facts in the *Holland* case. The *Holland* decision was based upon the rights and duties of a lawyer in his individual capacity and not upon the rights and duties of a judge in his judicial capacity. In the case at bar the Grand Jury, on April 2, 1947, was investigating the conduct of

Drury and Connelly not in their individual capacity, but rather in their capacity as police officers and the performance of their duties as such police officers arising out of and during the course of their employment. The court, in the *Holland* case, clearly recognized the distinction between a police officer and a lawyer who is not specifically charged, as is a police officer, with the duty to enforce laws, and implied that a police officer is especially charged with the duty to prevent crime and to disclose any evidence that would assist in the apprehension of criminals, and that such duty placed upon him is of such character as to require, in honesty and good conscience, that he waive his right against self-incrimination; and that if he fails to do so he is subject to discipline. The *Holland* case involved the question of whether a lawyer has the right to refuse to sign an immunity waiver prior to being interrogated by the Grand Jury during an investigation of a matter in which the lawyer was in no way involved. The sole question in the case at bar is whether the Civil Service Commission has the right to discharge a police officer who refuses to sign an immunity waiver prior to testifying before the Grand Jury during an investigation pertaining to the personal acts and conduct of such police officer arising out of and during the course of his employment.

The *Holland* case is not authority for the proposition that the Civil Service Commission cannot discharge a police officer for conduct unbecoming a police officer if he refuses to sign an immunity waiver prior to testifying before the Grand Jury investigating the personal acts and conduct of such police officer arising out of and during the course of his employment.

IV.

Class legislation and discrimination is not an issue in the case at bar.

Petitioners argue (Petition pp. 24, 29, 34, 36-37, 42) that the ruling of the Civil Service Commission and the judgments of the Appellate Court and Supreme Court of the State of Illinois results in class legislation and discrimination against police officers, and particularly against the petitioners.

The Civil Service Commission and the courts of Illinois do not create class legislation or any other kind of legislation. That is the sole province of the General Assembly of the State of Illinois. The General Assembly enacted the Cities Civil Service Act including Section 12 thereof. This Act has been held constitutional by the Supreme Court of the State of Illinois (*The People* v. *Kipley*, 171 Ill. 44, 70-72; *The People* v. *City of Chicago*, 337 Ill. 100, 103-106).

In *The People* v. *City of Chicago*, 337 Ill. 100, the Supreme Court of Illinois held that Section 12 of the Cities Civil Service Act is not unconstitutional as class or special legislation, saying (p. 108):

> "We are of the opinion that this provision of section 12 finds basis in a substantial distinction between a laborer and others included under the Civil Service act, which distinction bears a reasonable relation to the purposes of the legislation, and that the difference in manner of discharging appellant there provided does not render the act invalid. *People* v. *Brady, supra; People* v. *Coffin*, 282 Ill. 599; *People* v. *Loeffler, supra; People* v. *Waring*, 149 N. Y. 621; Black on Const. Law, pp. 574, 575.
>
> Nor can this act be said to be special legislation, in contravention of section 22 of article 4 of the constitution, since it applies to all persons classified by the

civil service of the city of Chicago as laborers and is operative only after its adoption by a vote of the people. *People* v. *Kipley, supra.*"

The ruling of the Civil Service Commission and the judgments of the Appellate and Supreme Courts of Illinois do not result in class legislation or discrimination against police officers. The effect of their decisions results merely in the construction of the Cities Civil Service Act and particularly Section 12 thereof. Their decisions are a determination that it is "cause" for removal, under Section 12 of the Act, for a police officer to refuse to sign an immunity waiver, prior to testifying before the Grand Jury, concerning matters arising out of and during the course of his employment.

As we have hereinbefore pointed out under Point III, a police department, as noted by Judge Murray F. Tuley, is peculiar in that it is practically an organized civil force resembling in many respects a military force; it is a department which requires that the members of it shall surrender their individual opinion and power to act and submit to that of a controlling head, just as much as a common soldier must surrender his own opinion and power of action to that of his commanding officer. The necessity of discipline, because of the peculiar duties and dangers which members of a police force encounter and the necessarily high degree of integrity which every member must maintain in order that public confidence and respect in the officers of the law may be justified, are a sufficient basis for classifying police officers as separate and apart in many of these respects from an ordinary employee. Based on the foregoing, the complaint of the petitioners that they are discriminated against because they are police officers, is unsound and untenable. They have deliberately selected a vocation which requires that they surrender certain of their

personal privileges. The recognition of this fact by the Civil Service Commission and the courts of the State of Illinois, and courts of other jurisdictions in this country, results in the inescapable conclusion that classifying police officers in a separate category is based upon a reasonable difference between them and other employees or citizens and constitutes a complete answer to their complaint that they have been unlawfully discriminated against.

Conclusion.

The respondents have conclusively demonstrated as follows:

1. That the petitioners failed to raise any constitutional issues in the State courts, and are, therefore, precluded from seeking a review in this court.

2. That the petitioners waived all constitutional issues, if any, by not appealing to this court from the judgment of the Supreme Court of Illinois, which transferred the cause to the Appellate Court of Illinois, First District.

3. That neither the Supreme Court nor the Appellate Court of Illinois determined a constitutional question but rather limited their decisions to a construction of the statute, namely, whether petitioners' refusal to sign immunity waivers constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois.

4. Under certain circumstances an individual might, because of his employment, business or occupation, or duties, be considered to have waived his right to assert his personal privilege against self-incrimination.

5. The petitioners have the right to refuse to testify and to refuse to waive their immunity, but it does not follow

that upon such refusal, constitutionally, they must be permitted to retain their office.

6. The refusal of the petitioners to sign an immunity waiver prior to testifying before the Grand Jury as to matters arising out of and during the course of their employment is "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois.

7. That the basic question here is not the petitioners' right to exercise a constitutional privilege but rather whether their refusal to sign an immunity waiver was a breach of their public trust which impaired the efficiency, standards and morale of the police department of the City of Chicago and, therefore, constituted conduct unbecoming a police officer and was "cause" for removal under Section 12 of the Cities Civil Service Act of the State of Illinois.

8. That the classification of police officers in a separate category is based upon a reasonable difference between them and other employees or citizens.

9. The decision of the Appellate Court of Illinois is in accordance with the law and in no way conflicts with the Federal Constitution.

WHEREFORE, The respondents pray that this court deny the Petitions for Writ of Certiorari filed herein.

Respectfully submitted,

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